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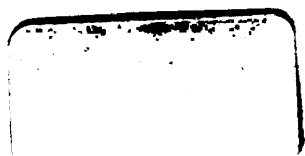
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The High Court of Chancery,

FROM 1736 TO JULY, 1739,

FROM THE ORIGINAL MANUSCRIPTS OF

LORD CHANCELLOR HARDWICKE

AND

The Contemporaneous Reports,

COMPARED WITH AND CORRECTED BY LORD HARDWICKE'S

NOTES:

WITH NOTES AND REFERENCES TO FORMER AND SUBSEQUENT
DETERMINATIONS AND TO THE REGISTER'S BOOK.

By MARTIN JOHN WEST, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. I.

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PREFACE.

LORD CHANCELLOR HARDWICKE's Manuscripts were originally intrusted, by the present Lord *Hardwicke*, to Mr. *Pepys*, with a view to their publication ; before he had made any considerable progress in the Work his professional avocations rendered the further prosecution of it impossible ; and he sometime since, with Lord *Hardwicke's* permission delivered over the Manuscripts to the present Editor with a similar view.

THE present Volume contains the decisions of Lord Chancellor *Hardwicke* from the year 1736 to July, 1739, comprising those cases which have been already reported together with other cases which have not appeared in Print.

THOSE Cases which have not appeared in Print, and some of those which have been reported where a more accurate Report has been found, have been taken from Lord *Hardwicke's* Note-books and other Manuscript Papers found in the Collection of the present Lord *Hardwicke* ; but where no Report has been found, or the printed Report has corresponded with the cases in the Note-books and other Manuscript Papers, the printed Report has been adopted.

THE Editor has compared all the Cases with the Register's Book, where he has found them inserted, and some of the Cases with the Records in the Six Clerks' Office ; he has likewise to many of the Cases subjoined Notes, wherein observations are made upon the ancient and modern authorities, with reference to the principles which the decisions of Lord *Hardwicke* have established.

THE Note Books of Lord Chancellor *Hardwicke* generally contain the material proceedings of the Court during each day, the statement of the Case, the evidence and the arguments of Counsel, and frequently during the arguments of Counsel, the answers to their arguments, which are inclosed within brackets ; the judgments are either entered in his Note-books or are contained in separate Papers, to which reference is made in his Note-book.

THREE entire Note Books, and nearly the whole of a fourth, besides other Manuscript Papers, refer to the period which this Volume embraces.


UPON the higher judicial qualities of Lord *Hardwicke*, which are so universally acknowledged in the profession, the Editor has not presumed to make any observations ; but he cannot refrain from observing, that it is only those who have had access to his Manuscripts, who can correctly estimate the care, assiduity, and labor, which he bestowed upon the duties of his high office.

MASTERS OF THE ROLLS.



SIR JOSEPH JEKYLL appointed Master of the Rolls,
July 13th, 1717.

The **HONOURABLE JOHN VERNEY** succeeded him
the 29th of Sept. 1738.



ATTORNEY-GENERAL,

SIR DUDLEY RYDER.



SOLICITOR-GENERAL,

SIR JOHN STRANGE.



Alphabetically disposed, in such a double Order, as that the Cases may be found by the Names either of the Plaintiffs or Defendants.

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[illegible]

ERRATA.

- P. 21, l. . for "*Bensley v. Bensley*," read *Beasley v. Beasley*.
P. 50, 51, 52, 53, and 54, in the word "travelling" l. omitted.
P. 66, note (1). The sentence referred to as taken from Lord
Hardwicke's Note-book begins at the words "the
credits," last line, page 67.
P. 74, l. 27. for "daughter" read daughters.
P. 119, note (1). for "3 Meriv. Rep." read 2 Meriv. Rep.
P. 219, note (1). for "*Okeden v. Okeden*," read *Okeden v. Walter*.
P. 255, l. 4. for "1,300l.," read mortgage.
P. 304, l. 33, marginal note, for "property of," read property of
A., dele "or."
P. 328, l. 23. marginal note, for "as he should have," read as he
should leave.
P. 470, l. 6. marginal note, after "Item." read to his niece *S.*
Swynburne.
P. 573, l. 8. marginal note, for "every one," read every year.

CASES IN CHANCERY.

HILARY TERM, 1736.

PARTERICHE *versus* POWLET. (1)

Feb. 26, 1736.

IN this case the *Lord Chancellor* laid down the following 1 Atk. 467.
Rules :—

Where a husband is left sole executor, he is entitled to the surplus, and it shall not be construed as a resulting trust.

(1) The rules here stated to be laid down by the *Lord Chancellor* are taken from *Atkyns*. They do not appear in *Lord Hardwicke's* Note-book ; But the following statement of the case is taken from *Lord Hardwicke's* Note-book and the Register's Book.

John Ward by his will of the 16th of November 1717, devised his estates (after certain limitations which were determined) to his two daughters *Elizabeth* and *Sarah* as tenants in common in fee, and gave 2,000*l.* equally between them, to be raised by sale of timber to be felled from any of his lands, and appointed them executrixes and residuary legatees, and soon afterwards died, leaving his wife, *Ann Ward*, *John Ward* his son, *Elizabeth*, *Sarah*, *Mary*, and *Ann Ward*, his daughters him surviving. *Mary Ward*, one of his daughters, being possessed of considerable personal estate, on the 23d of June, 1726, made her will, and after giving some specific and pecuniary legacies, gave the residue of

her personal estate to her two sisters, *Elizabeth* and *Sarah*, and appointed them executrixes of her will ; and on the 23d of June 1726 died. Part of *Mary Ward's* personal estate at the time of her death, consisted of several outstanding mortgage securities. On the 28th of April, 1728, *John Ward*, the brother, died intestate, possessed of considerable personal estate. *Sarah* being thus entitled to the moiety of a real estate and considerable personal estate, both in her own right, and as joint-tenant with her sister, (though the same was not actually in her possession.) Upon a marriage with the plaintiff, he, by indentures of the 1st and 2nd days of June 1730, in consideration of the marriage, and of the sums of 4,500*l.* and 800*l.*, making together 5,300*l.* agreed by her to be paid to trustees in discharge of incumbrances upon the plaintiff's estates, conveyed certain estates to trustees, in trust for the use of *Sarah Ward*, in case she survived him, for her life, for her jointure, with other remainders

PARTERICHÉ If two tenants in common put out money as joint executors, it shall not survive, but shall go respectively to those persons who are the proper representatives of each.

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over. And by Indentures of lease and release of the same dates with the last mentioned indentures, the said *Sarah Ward*, after reciting the intended marriage, and that the plaintiff was to have the sum of 5,300*l.* as her marriage portion, and that the plaintiff had contracted and agreed with her, that, notwithstanding the marriage, she should hold and enjoy, to and for her separate use and disposal, and *for want of such disposal, and for want of issue of her own body, her heirs and next of kin respectively of her own family of the Wards, should have and enjoy all the manors, land, and hereditaments, with all the appurtenances, and all her personal estate whatsoever*, except the said 5,300*l.*, and the rents, issues, interest, and profits thereof, whereto she had any estate, right, title, claim or demand whatsoever, or whereto she had any claim upon the death of *Ann Ward* her sister, or *Ann Ward* her mother, in consideration of the said intended marriage, and for settling and conveying the said lands and hereditaments, in trust for her the said *Sarah Ward*, and her heirs and assigns for ever, and that the same might be for the sole and separate use of her the said *Sarah Ward*, without the control of the plaintiff, her husband, granted and conveyed to the trustees and their heirs, all the said moiety or half part of the said manor, to the use of herself and her heirs till marriage, afterwards to permit her to receive the rents and profits to her own separate use during her life without impeachment of waste, remainder to the use of such person or persons, and for such uses as she should direct limit and appoint. Remainder in default of appointment to her right heirs. *Ann Ward*, the mother, died on the 25th of March 1731, intestate, and possessed of considerable personal estate, and which, upon her death, was taken possession of by her daughters, *Elizabeth* and *Sarah*. *Sarah* on the

22nd of May 1731 made her will, and devised all the moiety of her lands comprised in the settlement to trustees, upon trust, first to satisfy and pay all her just debts, and afterwards to apply the rents and profits for the benefit of such child or children as she should leave, and for want of such issue she directed that the rents thereof should be to the use and behoof of the plaintiff for life without impeachment of waste, and appointed him sole executor of her will, and died in the year 1731 without issue.

In November 1731, a commission of lunacy was taken out against *Ann Ward*, the sister of *Sarah* and *Elizabeth*, and *Elizabeth* having intermarried with the defendant *William Powlet*, *William Powlet* and *Elizabeth* his wife were appointed her committees. The plaintiff brought his bill against *William Powlet* and *Elizabeth* his wife, and *Ann Ward*, the lunatic, for an account of the personal estates of *John Ward* the father, *John Ward* the brother, *Mary Ward*, *Ann Ward*, the mother of his late wife, and for an account of his late wife's real and personal estate. And the plaintiffs in a cross cause, brought their bill for an account of the same personal estates, so far as the plaintiff's wife possessed them.

Mr. *Brown* for the plaintiff.

The *Attorney General*, Mr. *Verney*, Mr. *Fazakerly*, and Mr. *Clark*, for defendants.

The *Lord Chancellor* directed an account of the personal estate of *John Ward* the father, and after payment of his debts and legacies, directed the surplus to be divided into two moieties, one moiety to be considered as part of the personal estate of the plaintiff's late wife *Sarah*, and the other was to be paid to or retained by the defendants *Powlet* and his wife. And he directed an account of *Mary Ward's* personal estate, and as to so much as was re-

A devise of the rents and profits of an estate to the husband for life without impeachment of waste, shall not be considered as annual profits only, but will empower him to cut timber. (2)

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Tenant for life pays one third of interest upon debts and legacies, and reversioner two-thirds. (3)

ceived in the lifetime of the said *Sarah*, the Master was to see whether any act was done to sever the joint-tenancy of such part, and such part as was received by *Sarah* in her lifetime was to be a debt upon her estate, and the plaintiff was to account for what he had received. And he directed an account of the personal estate of *John Ward* the brother of the plaintiff's wife, and after payment of debts, directed it to be divided into four parts: One-fourth part to be paid to the plaintiff as standing in the place of his late wife, and to be considered as part of the personal estate of his late wife, one-fourth part to be paid to defendants *Powlet* and his wife; one other fourth part to be paid to the committees of *Ann Ward* the lunatic for her benefit, and the other fourth part was to be considered as part of the personal estate of the mother *Ann Ward*. And an account was directed of the personal estate of *Ann Ward* the mother, and after payment of debts, he directed the residue to be divided into three parts: One-third part thereof to be considered as part of the personal estate of the plaintiff's late wife; one other third part to be paid to defendants *Powlet* and his wife; and the other third part to be paid to the committees of *Ann Ward* the lunatic, for her benefit. And it was further ordered that an account should be taken of the personal estate of the plaintiff's late wife come to the hands of the plaintiff or any other person. And it was ordered that the personal estate of the plaintiff's late wife, should be applied in the satisfaction of her debts, and of the said sum of 5,300*l.* or so much as should remain unsatisfied. And so much as should appear due to the plaintiff for the sum of 5,300*l.*, or for the surplus of his late wife's personal estate was to be paid to or re-

tained by the plaintiff, and in case the personal estate should be deficient to pay debts, his Lordship declared that the residue was to be raised by a fall and sale of timber growing on the trust-estates devised by her will, and he directed that the defendants should account for the rents and profits of the real estate devised to the plaintiff for life, which were to be applied in the first place to keep down the interest of the surplus of *Sarah's* debts not satisfied by her personal estate, and the residue was to be paid to plaintiff.

And it was further ordered that the plaintiff in the original cause and defendant in the cross cause should come to an account with the lunatic and her committees for such part of the personal estate, and the rents and profits of the real estate of the said lunatic, and what had been received by the plaintiff was to be paid over to the said lunatic and her committees, and what had been received by his late wife was to be considered as a debt upon her estate. And his lordship directed a partition to be made of the devised estates, and that the plaintiff was to hold such part as was allotted to him, according to his wife's will, subject to the order of the court, but not to fell timber without leave of the court, unless for necessary repairs and botes. Reg. Lib. B. 1736. fo. 223. Reg. Lib. B. 1741. fo. 443.

(2) See Co. Litt. 4 b.

(3) No such principle is warranted by this case, nor does any such rule now prevail. Tenant for life is obliged to keep down the interest upon incumbrances. *Bridgman v. Dove*, 3 Atk. 201. *Revel v. Watkinson*, 1 Ves. 93. *Amesbury v. Brown*, 1 Ves. 480. *Buckridge v. Ingram*, 2 Ves. jun. 652. *White v. White*, 4 Ves. 33., and 9 Ves. 559.

MICHAELMAS TERM, 1740.

PARTERICHE v. POWLET. (1)

S. C. *Ante*, p. 1.

Upon the Master's Special Report.

October 14, 1740.

2 Atk. 54.

Sarah Ward, being entitled to real estate, and as joint-tenant with her sister *Elizabeth Powlet* to personal estate, amongst which were mortgage securities, by settlement upon her marriage, after reciting that it had been agreed by her husband that she should enjoy to her separate use and disposal her real and personal property, and for want of such disposal, and for want of issue of her own body, her heirs and next of kin respectively of her own family should have and enjoy the same, conveys her real estate to

the uses of the settlement, but makes no assignment of the personal property. The whole of the money due upon one of the mortgage securities, called *Cutfield's* mortgage, was received by her husband, who together with his wife gave a note promising to be accountable to *Elizabeth* for half the sum upon *Cutfield's* mortgage, and interest until *Newland's* and *Croucher's*, two of the other mortgages, were made over to *Elizabeth*: held that there was a severance of the joint-tenancy as to *Cutfield's*, *Croucher's*, and *Newland's* mortgages; but that the settlement was no severance of the joint-tenancy of any part of the personal estate; and that there was no severance as to the joint-tenancy of one of the mortgages, by one of the joint-tenants having advanced an additional sum to the mortgagee, and taken a conveyance in her own name.

THE Master, by his report of the 2nd of May, 1739, found that 410*l.* 2*s.* 1*d.* part of the personal estate of *Mary Ward* had been equally divided between the plaintiff *Parteriche* and his late wife, and the said defendant *Powlet* and his wife, in the plaintiff's late wife's lifetime, and he found that 847*l.* 16*s.* had been received by plaintiff on *Cutfield's* mortgage, and that a moiety thereof amounting to the sum of 423*l.* 18*s.* belonging to the defendants *Powlet* and his wife was retained by the plaintiff, and that the plaintiff and his late wife gave to the defendants *Powlet* and his wife, a note bearing date the 4th day of February, 1730, thereby promising to be accountable to the said defendant *Elizabeth* for half the sum that should be paid upon *Cutfield's* mortgage, and to carry interest for the same from the time they received it till they made over their share of *Newland's* and *Croucher's* security; but it did not appear to the Master that the plaintiff or his late wife ever made over their interest in the said *Newland's* and *Croucher's* securities, and that the said *Croucher's* security was originally made to the said *Mary Ward*, for the sum of 200*l.* That after the said *Mary's* death, the said *Croucher* wanting the further sum of 50*l.*, applied to the said defendant *Elizabeth*, who advanced the same, and that the said security was then altered and

(1) The statement of this case by Mr. *Atkyns* is incorrect. The Master's report in this case is taken from the Register's Book; the arguments of

counsel from Lord *Hardwicke's* Notebook; and the judgment, with an addition from Lord *Hardwicke's* Notebook, from *Atkyns*.

made to the said defendant *Elizabeth* and the plaintiff's late wife for 250*l.*, and that *Billinghurst's* security was originally made to *Mary Ward* for the sum of 200*l.*, but that since *Mary Ward's* death, there being due thereon for principal and interest 222*l.* 4*s.* 6*d.*, and the said *Billinghurst* wanting the further sum of 27*l.* 15*s.* 6*d.* applied to the said defendant *Elizabeth* to supply him therewith, which she accordingly did, and then the said security was altered and made to the defendant *Elizabeth* for 250*l.*:—and the Master further certified, that the defendants *Powlet* and his wife insisted that the several sums of money mentioned by him in the schedule and his report to be received by them since the death of the plaintiff's late wife, and the mortgages and money due thereon, belong to him and his said wife by survivorship:—and the Master further certified, that it did not appear to him that there was any other act done to sever the joint-tenancy of *Mary Ward's* personal estate received in plaintiff's late wife's lifetime, but that the plaintiff insisted that the joint-tenancy was severed by the deed of the 2nd June, 1730. (2)

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The case came on to be argued upon the Master's report. 14th Oct. 1740.

Mr. *Brown* and Mr. *Murray* for the plaintiff contended that there had been a severance of the joint-tenancy, first, by the settlement made by *Sarah* of her own property upon her marriage with the plaintiff: secondly, by the acts done between the two sisters. That the settlement was declaratory of *Sarah's* intention to sever the joint-tenancy. That the receipt of 847*l.* by the plaintiff on *Cutfield's* mortgage, and the note given by him and his wife to Mrs. *Powlet* amounted to an agreement to sever the joint-tenancy in respect of *Cutfield's*, *Croucher's*, and *Newland's* mortgage; and as to *Billinghurst's* security, that the alteration of the security by *Elizabeth* having taken a conveyance in her own name, had severed the joint-tenancy both in law and equity.

The *Attorney-General* and Mr. *Cupper* for the defendants, insisted, that in order to make a severance in equity, there must be an agreement between the joint-tenants.

That the end of the settlement was not to sever the joint-tenancy, but only to take away the power of the husband over the property of the wife. That there was no act done

(2) This deed is stated in the note (1) to *Parteriche v. Powlet*, when it came on to be heard in 1736.

PARTERICH v. POWLET. by the wife to give it to the issue. That the note was not intended to sever the joint-tenancy with respect to the securities mentioned in the note, and they cited *Collins v. Harris*, 3rd May, 1737. *Moyse v. Giles*, 2 Vern. 385. *Musgrave v. Dashwood*, 2 Vern. 63. (3)

17th Oct. 1740.

An actual alienation only can sever a joint-tenancy. A declaration of one of the parties that it shall be severed, is not sufficient.

LORD CHANCELLOR.—There is a severance of the joint-tenancy in *Cutfield's*, *Croucher's*, and *Newland's* securities, and they must be divided equally between the plaintiff and the defendant *Powlet* and his wife, but as to the rest of *Mary Ward's* personal estate there is no severance; for first, here is no agreement for that purpose: secondly, if no agreement, then there must be an actual alienation (4) to make it amount to a severance; the declaration of one of the parties that it should be severed, is not sufficient, unless it amounts to an actual agreement; (5) and here is nothing in the marriage settlement which amounts to an alienation, either in law or equity, for the real intention was to preserve

(3) *Musgrave v. Dashwood* has been over-ruled by *Hinton v. Hinton*, 2 Ves. 632. and by *Brown v. Raindle*, 3 Ves. jun. 257.

(4) Alienation by devise does not sever joint-tenancy. Litt. 287. 1 Inst. 185 a. *Moyse v. Giles*, 2 Vern. 385.

(5) But a severance of joint-tenancy may be inferred either from the nature of the transaction or the acts of the parties. From the nature of the transaction,—as where persons are joint purchasers of land, with a view to a hazardous undertaking; *Lake v. Craddock*, 2 P. Wms. 158.—or where the transaction partakes of the nature of trade, as the purchase of stock upon a farm; *Jefferies v. Small*, 1 Vern. 217.—or where the lease of a farm itself is taken only for the same purpose as the stock, and the lease is only considered as the substratum, per Lord *Thurlow*, in *Elliott v. Brown*, cited in 9 Ves. 597.—or where two persons lay out money upon mortgage, and take the mortgage to themselves jointly; *Petty v. Styrd*, 1 Ch. Rep. 57.—or where two make a joint purchase, and the purchase-money is not paid in equal proportions. *Lake v. Gibson*, 1 Eq. Ca. Ab. 291. A severance may likewise be inferred from the acts of the parties; as a covenant by a joint-

tenant to sell; dict. per Lord *Alvanley*, *Brown v. Raindle*, 3 Ves. 257. But an agreement by an infant is not a severance. *May v. Hook*, Harg. Co. Litt. 246. note 1. So where two parties took under a will both in the capital and the profits of a trade as joint-tenants; but carried on the trade for twelve years, as partners, one advancing more capital than the other, one taking more profit than the other, holding themselves out in all their transactions as partners from the death of their testator; a severance was inferred both as to the capital and profits. *Jackson v. Jackson*, 9 Ves. 591. *Quære*, whether persons merely acting as partners in trade for twelve years, would not sever a joint-tenancy created by a will; ib. So where two persons had divided equally between themselves all the property to which they were entitled as joint-tenants under the will of their testator, except a sum of 350*l.*, set apart to answer an annuity given by the will, and a sum of 8,000*l.* set apart to answer the contingencies of the testator's will: It was held that their general dealing with respect to that part of the property of the testator divided between them was sufficient evidence of their intention to divide the whole. *Crooke v. De Vandez*, 11 Ves. 330.

the right of the wife as it was, so that her property might not be altered by the interposition of the husband; and, for any thing that appears to the contrary, it might likewise be intended to preserve the right she might have of survivorship, upon Mrs. *Powlet's* dying before her.

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There is besides another reason, the other joint-tenant was no party to the deed.

The only thing that could give the least colour to the supposition of [a severance of the] joint-tenancy are these words in the marriage agreement, for want of issue of her own body, then it shall go to the next of kin of her own family.

The words within brackets are not in *Atkyns*, but are inserted in order to make the passage intelligible.

But I do not think they are sufficient to make the issue of her body purchasers, or to give them a right to come into this Court as purchasers, to have the agreement carried into execution in their favour; if it had, I should have inclined to think it a severance; but, notwithstanding these words, it still leaves it at large, and absolutely at the wife's disposal.

A joint-tenancy is undoubtedly no favourite (2) of a court of equity, though otherwise at law; but, in the present case, here is no pretence of an alienation, either in law or equity. *Moyse v. Gyles*, 2 Vern. 385.

Alienatio rei prefertur juri accrescendi, is a maxim in equity; but then it must appear to be an actual alienation, and not from inference and implication only, without any express declaration of the parties.

(2) *Rigden v. Vallier*, 2 Ves. 258.

HILARY TERM, 1736.

Sir BIBYE LAKE v. Sir THOMAS HALES, and others. (1)

28th February, 1736.

1 Atk. 281.

LORD CHANCELLOR.—His Lordship said, there had been a difference of opinion amongst judges; whether a demand

Every indorser is a new drawer.

(1) What Lord *Hardwicke* is stated to have said in this case is taken from *Atkyns*, where it is reported, under the names of *Lake v. Hayes*.

The following statement of the case is taken from Lord *Hardwicke's* Note and the Register's Book:—
Sir *B. Lake* brought his bill against

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must be made upon the drawer of a bill of exchange, to entitle an indorsee to an action, but that he was very clear in his own judgment, there is no occasion to make that demand, for he considered every indorser as a new drawer. (2)

It was adjudged by the late *Master of the Rolls*, that a bill in Chancery, which had been depending almost six years, ought not to be considered as a sufficient demand of the debt, so as to take it out of the statute of limitations. (3)

Rule as to the
statute of limi-
tations.

the defendants, who were the personal representatives of *William* and *Robert Hales*, for payment of a note of 800*l.*; and the bill stated, that *Wm. Hales* being possessed of two negotiable notes, both bearing date the 6th of April, 1726, under the hands of *Robert Hales* deceased, both payable to *Robert Hales*, three months after date, one for 440*l.* and the other for 430*l.* and both indorsed by *Robert Hales*; and thinking that he could get a bill of the plaintiffs more easily discounted than he could the two notes, requested the plaintiff to give him his note for 800*l.* payable at a future time, and that he would for the plaintiff's security, leave *Robert Hales's* notes with the plaintiff, in order that he might pay himself the 800*l.* out of the two notes when they became payable, and return the overplus to *Wm. Hales*; and he promised, that in case the two notes were not punctually paid, that he would take care to discharge the plaintiff's note. That the plaintiff thereupon delivered to *Benjamin Wilcock*, a person whom he employed, a note for 800*l.* payable on the 2d May, 1726, and directed *Wilcock* to indorse, and deliver the same to *William Hales*, which he accordingly did; and *William Hales* delivered to *Wilcock* in trust for plaintiff, the two notes of the 6th of April, 1726, and signed a paper, promising to indemnify both the plaintiff and *Wilcock* against the 800*l.*, and that he had left the two notes as security for the 800*l.* That the 800*l.* was paid to *William Hales*, and that *Wilcock* thereupon being discharged from the 800*l.* note, delivered up the two notes to *William Hales*. The defendants put

in their answer to the bill, and denied any knowledge of the circumstances stated in the bill. And the plaintiff entered into evidence to shew that the 800*l.* was advanced. The only point insisted upon in argument by *Mr. Browne*, the counsel for the defendant, was, as to the insufficiency of the evidence of payment of the 800*l.*, whereupon the *Lord Chancellor* directed an issue, to try whether any sum of money had been advanced by the plaintiff in satisfaction of the note of the 2d May, 1726; and the jury having found that the plaintiff had advanced 800*l.* in satisfaction of the note, the cause came on to be heard, on further directions on the 17th June, 1737; when it was ordered, that the 800*l.* and interest, should be paid to plaintiff out of the assets of *Robert Hales*. Reg. Lib. B. 1736, fo. 223. Reg. Lib. B. 1737. fo. 397.

(2) And it is now settled that there is no occasion to make that demand. *Harry v. Perritt*, 1 Salk. 133. *Bromley v. Frazier*, 1 Strange. 441. *Lawrence v. Jacob*, ib. 515. *Heylyn v. Adamson*, 2 Burrow, 674. *Bayley* on Bills of Exchange, 4th Ed. 374. Though *Sidebotham v. Smith*, 1 Stra. 649. *Collins v. Butler*, 2 Stra. 1087. are *contra*.

(3) If there be a suit in equity for a demand, for which an action at law is afterwards brought, but during the pendency of the suit the statute of limitations becomes a bar to the plaintiff's demand at law, a court of equity will not interfere to prevent the defendant's pleading the statute of limitations in bar to the action, *Cradock v. Marsh*, 1 Ch. Rep. 109. *Hurdret v. Callador*,

ib. 114. *Anon.* 2 Ch. Ca. 217. Contra *Anon.* 1 Vern. 73,

But where a court of equity directs an action to be brought in a matter concerning which a court of equity and court of law have a concurrent jurisdiction, and during the pendency of the suit the statute becomes a bar, *Mackenzie v. Marquis of Powis*, 4 Bro. P. C. 337.; or where the party is stayed from proceeding at law by the act of the court; *Anon.* 2 Ch. Ca. 16. *Pulteney v. Warren*. 6 Ves. 73; or

where it is necessary for a party to ask the assistance of a court of equity, in order to aid him in his legal remedy, that outstanding terms may not be set up, or that deeds in the possession of the party, against whom he seeks to recover at law, may be produced; in such cases a court of equity will prevent the statute from being pleaded, *Pinche v. Thorneycraft*, 4 Bro. P. C. 92. *Bond v. Hopkins*, Scho. & Lef. Rep. 413.

AFTER HILARY TERM, 1736.

The DUCHESS of MARLBOROUGH v. Sir THOMAS WHEAT. (1)

LORD CHANCELLOR laid it down in this case, that Masters in Chancery in reports which are special, are not to set forth the evidence with their opinions upon it, but only to state the bare matter of fact for the judgment of the court, in the same manner as in courts of law, they only state the facts allowed by both sides in a special verdict, but never meddle with any part of the evidence on either side.

1 Atk. 454.
Masters in Chancery in reports, are only to state bare matters of fact.

(1) This case does not appear in Lord Hardwicke's Note-book, but is taken from 1 Atk. 454.

AFTER HILARY TERM, 1736.

The ATTORNEY GENERAL v. HAYES.

1 Atk. 356. LORD CHANCELLOR: Where a legacy is given to a charity, interest shall be paid from the death of the testator. (1)

(1) This proposition which is taken from *Atkyns*, is neither warranted by Lord *Hardwicke's* Note-book, where this case appears, nor by the decree in the Register's Book. By the decree in the Register's Book it appears, That *Judith Cole*, bequeaths 100*l.* to the ministers and churchwardens of Chelsea, in trust, to invest the same, in the purchase of lands or other good security, and to distribute the yearly interest thereof among six poor widows of Chelsea. Lord *Hardwicke* decreed, that the charity should be established; and directed the master to compute what

was due for the said legacy of 100*l.* with interest for the same, after the rate of 4 per cent. from the end of one year, after the death of the said *Judith Cole*; such interest to be added to the principal, and laid out in government or other securities, in the names of the said ministers and churchwardens, in trust for the charity. Reg. Lib. A. 1736. fol. 346. A similar decree was made in the *Attorney-General v. Pearce*, as it appears in the Register's Book. Reg. Lib. A. 1740. fol. 216., and in Lord *Hardwicke's* Note-book.

OXLEY v. LEE. (1)

28th February, 1736.

1 Atk. 625.

The court will not decree a voluntary conveyance to be delivered up to a purchaser for valuable consideration, unless obtained by fraud. LORD CHANCELLOR said in this cause, he did not remember that this court ever decreed a voluntary conveyance to be delivered up to a purchaser, upon a valuable consideration, unless it appears there are some circumstances of fraud,

(1) What Lord *Hardwicke* is reported by Mr. *Atkyns* to have said in this case, does not appear in Lord *Hardwicke's* Note-book; but the case, as stated in his Lordship's Note-book, corresponds with the report of it in the Register's Book, where it is stated,

"That *Joseph Stevens*, being entitled to a lease of the premises in question, in consideration of the natural affection he bore his daughter, the wife of *Richard Lee*, and in consideration of 5*s.* paid by *Lee*, assigned over the lease to him. This lease being subject to a

attendant upon such conveyance.(2) A case was mentioned to be determined by the late *Master of the Rolls*, where a voluntary conveyance was decreed to be delivered up, though no circumstance of fraud appeared.

mortgage, was, after the marriage, assigned to a trustee, in trust for *Lee* for life; remainder to his wife for life; remainder to the issue of the marriage. *Oxley* purchased of *Lee* these premises for a valuable consideration, and without notice of the settlement or mortgage. Decreed, that the trustee should convey the legal estate to the purchaser, that the settlement should be delivered up, and that *Lee* should pay off the mortgage money." Reg. Lib. 1736. fol. 188.

(2) It is now settled, that a voluntary conveyance, though it be for a good and meritorious consideration, is fraudulent within the stat. of the 27th Eliz. c. 4. against a subsequent purchaser for a valuable consideration, *Lord Townsend v. Windham*, 2 Ves. 11. Dict. per Lord Hardwicke. *Doe*, dem. of

Otley, against *Manning*, 9 East's Rep. 59. and the cases there cited.

And a court of equity will, on behalf of a purchaser, decree the specific performance of an agreement for a purchase of lands, even when the purchase has been made with notice of a prior voluntary settlement, *Leach v. Dean*, 1 Ch. Rep. 78. *Parry v. Curwarden*, 2 Dick. 544. *Buckle v. Mitchel*, 18 Ves. 110.

But it will not assist a vendor by decreeing a specific performance on his behalf, to defeat his own prior voluntary settlement, *Smith v. Garland*, 2 Mer. Rep. 123.

Yet it will not interfere by injunction, to prevent a person, who has made a voluntary settlement on his wife and children, from selling, *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

SUMNER v. THORPE. (1)

1st March, 1736.

WHERE a bill is brought for a general account, and the defendant has set forth a stated one, the plaintiff must amend, but pays only the costs of the day.

There is no rule more strictly adhered to in this court, than that when the defendant sets forth a stated account, he shall not be obliged to go on upon a general one, because very often a stated account would unravel a perplexed affair, which might otherwise remain in the dark if left to a general one.

2 Atk. 1.

Where the defendant sets up a stated account to a bill brought for a general one, the plaintiff must amend.

(1) This case is taken from 2 Atk. 1. It corresponds with Lord Hardwicke's note of the same case,

except as to the direction about costs, in respect of which nothing is stated.

HENRY STAPYLTON, an Infant, by ANN, }
 his Mother, } Plaintiff ; (1)
 and
 PHILIP STAPYLTON, MARGARET STAPYLTON, Widow, EDWARD THOMSON, and FRANCIS TAYLOR, . . . } Defendants.

March 8th, 1736.

1 Atk. 2.

Where upon an issue directed to try the legitimacy of an infant, the jury found the infant illegitimate. The Court granted a new trial upon payment of costs.

By a deed dated the 21st of August, 1661, *Philip Stapylton* was tenant of the premises in question for ninety-nine years, if he so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip having two sons, *Henry* and *Philip*, they by deeds of lease and release of the 9th and 10th of September, 1724, reciting, that for settling and perpetuating all manors, &c. in the name and blood of the *Stapyltons*; and for making provision for his two sons, &c.; for preventing disputes and controversies that might possibly arise between the said two sons, or any other person claiming an interest in all or any of the estates thereafter mentioned, and for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum of 5s., release and confirm to *Thomson* and *Fairfax* all those manors, &c. To have and to hold to them, their heirs and assigns, to the use (as to part) of *Philip* the father, his heirs and assigns for ever, and as to another part, to the use of *Philip* the father for life, remainder to *Henry* the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to *Philip* the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of *Henry* in tail, remainder to the daughters of *Philip* the son in tail, remainder to the right heirs of *Philip* the father. And as to the remaining part, to the use of *Philip* the father for life, with

(1) The statement of this case is of counsel and the judgment from Lord taken from *Atkyns*. The arguments *Hardwicke's* Note-book.

like limitations in the first place to *Philip* the son and his issue, and then to *Henry* and his issue, remainder in fee to the father.

There were covenants by the father and his two sons to suffer a recovery within twelve months, to the uses in the said deed of the 10th of September, 1724, and there were covenants likewise for farther assurances. *N.B.*—To this deed, the heirs of the surviving trustee in the deed in 1661 were not parties.

But by deeds of lease and release dated the 28th and 29th of September, 1724, to which the heirs of the surviving trustee of the deed of 1661 were parties, the father and two sons make *Thomson* and *Fairfax* tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deeds of the 9th and 10th of September, 1724.

Before any recovery suffered *Henry* died, leaving issue the plaintiff.

Afterward by lease and release the 12th and 13th of April, 1725, to which the heirs of the surviving trustee of the deed of 1661 were parties, *Philip* the father and *Philip* the son covenanted to suffer a recovery, in which *Thomson* and *Fairfax* were to be tenants to the præcipe, to the use, as to part, of *Philip* the father, his heirs and assigns, and as to the other part to the use of *Philip* the father for life, remainder to *Philip* the son in fee.

In Trinity term 1725, a recovery was suffered, in which were the same tenant to the præcipe, the same demandant, and the same vouchees (except *Henry*, who was dead), as were covenanted to be by the first deed, it was likewise suffered within twelve months after the first deed.

The father *Philip Stapylton* being dead, the plaintiff, as son and heir of *Henry*, brought his bill to establish his title to the premises in question, and for the whole estate as tenant in tail under the settlement of 1661, and to be let into possession, and for an account of rents received by *Philip Stapylton* the son, due since the death of the plaintiff's grandfather, and to have the same applied for the plaintiff's benefit during his infancy, and for an injunction to restrain the defendants from receiving any more rents.

The defendant *Philip* the son by his answer confesses the several deeds before mentioned, but says, *Henry* was a bastard, and that by virtue of the deed of 1725, and of the recovery, he was entitled to the whole estate in question.

After an issue directed, and a verdict by which the plaintiff

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SMITH v. READ. (1)

March 18, 1736—7.

1 Atk. 526.
3 Vin. Ab. 540.
pl. 21. 3 Bac.
Ab. 799.

A bill brought
to discover
whether *Ann*

BILL by a Protestant claiming title, *and insisting upon* and praying a discovery, whether *Ann Payne*, under whom the defendant claims by devise was a Papist at the time of the purchase by her of the estate in question from the plaintiff's ancestor.

Payne, under whose will the defendant claims, was a Papist at the time of a purchase made by her of the estate from the plaintiff's ancestor. Defendant pleads as to the discovery the statute of the 11th and 12th of Wil. 3., by which, if *Ann Payne* was a Papist, she was disabled to take.

Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself; and as *Ann Payne* would not have been obliged to discover, the defendant, who claims under the same title, is entitled to the same privileges, and takes the estate under the same circumstances. The plea allowed.

As to the discovery whether *Ann Payne* was a Papist, the defendant pleads the statute of 11th and 12th of W. 3., by which, if *Ann Payne* was a Papist, she was disabled to take.

Mr. *Verney* and Mr. *Browne* for the defendant, argued that a person shall never be obliged to discover any matter which may subject him to any forfeiture. That the disability created by this statute amounts to a forfeiture, and that a person standing in the place of the original owner, must be entitled to the same privilege. The legislature did not conceive that persons were obliged to discover such facts as these, and therefore in the acts relating to presentations to livings, inserted a clause to prohibit all persons from pleading those forfeitures and penalties.

In the case of copyholds, the tenants are not obliged to discover waste or other facts whereby they may have forfeited their estates, Comyns, 671. A person who has bought goods after a bankruptcy may plead and deny notice. If an estate be limited to a widow during widowhood, the court will not compel her to discover whether she is married or not. *Monings v. Monings*, Ch. Cas. 68., and vid. *South Sea Company v. Doliffe*. (2)

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from Mr. *Atkyns's* Re-

port, which is nearly in the same words with that attributed to Mr. *Forrester*.

(2) Cited 2 Ves. 376.

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The *Attorney-General* and Mr. *Fazakerly* for the plaintiff, contended that the bill did not seek to discover a forfeiture, but to shew that there never was any title to the estate. That it was not like the case of taking away an estate once vested, but more like that of a bastard or an alien. In the case put of bankruptcy, the defendant must make discovery, if he had notice of it. But suppose this were a forfeiture, it cannot be the forfeiture of the defendant, but of some other persons by which his title would be defeated, but which does not amount to any personal disability in himself. It resembles the case of a man claiming by lease and release from a tenant in tail, without a fine or recovery.

LORD CHANCELLOR.—I think the defendant is not bound to discover; for there is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or any thing in the nature of a penalty.

Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself; and there is no difference between a forfeiture of a thing vested, and a disability to take, inflicted as a penalty; and the 11th & 12th of Wm. 3d. is a penal statute.

If this bill had been brought against the person himself, and there was no other penalty than this, I think he would not have been obliged to discover.

Therefore they who claim under the same title are entitled to the same privileges, and take the estate under the same circumstances.

As to its being a defective title only, it is true; but then it is a defect arising from a penalty.

The laws of bankrupts are not all penal laws; and in the cases of aliens, bastards, &c. there is a difference where the disability arises from the rules of law, and where it is imposed as a penalty.

If this plea was not allowed, it would affect numberless inheritances, and protestants more than papists. And where the legislature have intended discoveries of what is penal, they have put in clauses for that purpose, as in the statute of the 12th Anne, c. 14, of the livings belonging to papists.

The plea allowed.

JEFFERIES v. HARRISON, Executor of Sir THOS.
TRAVEL. (1)

18th March, 1736.

1 Atk. 468. LORD CHANCELLOR said in this cause, that when an executor
If an executor is defendant at law, and fails in his defence, the rule is, that
has paid simple contract he must pay costs *de bonis testatoris, si non de bonis propriis* ;

(1) What Lord *Hardwicke* is stated to have said in this case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book; but it appears from the Register's Book, where it is reported under the names of *Jefferies v. Stevenson*, that the executor was made to pay costs *de bonis propriis*, under the following circumstances:—"The plaintiff brought his bill to have satisfaction for a bond entered into by *Thomas Framwell* deceased, the defendant's testator, to the plaintiff, on the 19th of January, 1726, for payment of 954*l.* 16*s.* with interest, out of the assets of the said *Thomas Framwell*, come to the hands of the defendant, his surviving executor; and the defendant by his answer, insisting, that a judgment obtained against him and his brother, *Samuel Stevenson* deceased, his co-executor, for 256*l.* 10*s.* debt, and 5*l.* 10*s.* costs, ought to take place before the plaintiff's debt; and the plaintiff admitting, that the sum of 363*l.* 16*s.* 1*d.* part of the sum of 954*l.* 16*s.* for which the said bond was given, was not advanced, the cause came on to be heard on the 15th day of Novr. 1734, when it was ordered and decreed, that the defendant should be at liberty, if he thought fit, to examine the plaintiff upon interrogatories, before Mr. *Eld*, one of the Masters of the Court, whether the sum of 590*l.* 19*s.* 11*d.* residue of the money due on the said bond, or any and what part thereof was advanced by the plaintiff, or any person by his order, to *Thomas Framwell*, as the consideration of the said bond, and to inspect

the books and papers of the plaintiff for that purpose, which were to be produced before the Master by the plaintiff upon oath; and if it should appear to the Master by the plaintiff's examination, or by the said books and papers, or by any proof to be made before the Master, that any part of the said sum of 590*l.* 19*s.* 11*d.* was not advanced, then the Master was to take an account of what was due for the residue of the said sum of 590*l.* 19*s.* 11*d.* and the interest thereof; but unless it should appear as aforesaid, that the said full sum of 590*l.* 19*s.* 11*d.* was not advanced, then the same was to be considered as advanced as the consideration of the said bond; and the said Master was likewise to see, whether any thing, and what, had been paid towards satisfaction of the said principal and interest due on the said bond, and what, upon taking the said accounts, should appear to be remaining due on the said bond, it was ordered and decreed, that the defendant should pay the same to the plaintiff out of the assets of the said *Thomas Framwell*, in a course of administration; and, in case the said defendant should not admit assets for that purpose, then the defendant was to account before the said Master in the usual manner, and the consideration of costs was reserved till after the report. The Master made his report, dated 15th July, 1736, and certified, that there was due to the plaintiff on the said bond, from the estate of the said *Thomas Framwell*, for principal and interest, 871*l.* 14*s.* 5*d.*, and that there remained in

and as in this case, the executor has misbehaved himself, by paying simple contract debts, preferable to a bond creditor with notice, the court of Chancery has no occasion to vary it from the common course.

debts in preference to a bond debt, of which he had notice, he must pay costs de bonis testatoris, si non de bonis propriis. (2)

the defendant's hands a balance of 302*l.* 3*s.* 8*d.* due to the said testator's estate, and there were other debts, goods and effects belonging to the said testator, in the island of Barbadoes, which the defendant had not got in; but the defendant in his discharge, exhibited before the Master, insisted he had paid unto Mr. *John Norman*, the sum of 256*l.* 10*s.* for a debt, and 5*l.* 10*s.* costs, making together 262*l.*, on a judgment recovered against the defendant and his brother, *Samuel Stevenson*, as executors of the said *Thomas Framwell*, in the Court of King's Bench, as of Easter term, in the first year of his present Majesty's reign, and he claimed an allowance of the same out of the said *Thomas Framwell's* estate; but such judgment appearing to the said Master to have been obtained in the name of the said *John Norman*, in trust, and for the use and benefit of the defendant and his said brother *Samuel Stevenson*, and the debt whereon the same was so obtained being, at the time of the death of the said *Thomas Framwell*, only a debt upon simple contract, the Master conceived, the same ought not to be paid out of the said *Thomas Framwell's* estate till after satisfaction of the said plaintiff's bond, and had, therefore, as against the said plaintiff, disallowed the defendant's payment of the said 262*l.* to the said *John Norman*. And the cause coming on this present day to be heard before the Lord Chancellor, as to the matter of costs, in the presence of counsel learned on both sides, upon hearing the defendant's answer, an agreement between the plaintiff and defendant relating to the said bond of the 19th January, 1726, the decree made in the cause, and the Master's report, his Lordship doth order, that the defendant do pay unto the plaintiff the sum of 302*l.* 3*s.* 8*d.*,

reported to be in his hands, towards satisfaction of the plaintiff's demands, and do also pay unto the plaintiff his costs of this suit, to be taxed by the said Master; and in order to a satisfaction of the residue of the plaintiff's demands, it is ordered, that a proper person be appointed, with the approbation of the said Master, at the plaintiff's expence, to get in the debts and effects of the said testator *Thomas Framwell*, remaining beyond sea, and, in order thereto, that the defendant do give unto such person a proper authority, the plaintiff indemnifying the defendant therein; and when any of the debts and effects of the said testator remaining beyond seas shall be got in, the plaintiff is to be at liberty to apply to this court, touching satisfaction of the residue of his said demand, whereupon such further order shall be made in relation thereto, as shall be just." Reg. Lib. A. 1736. fo. 236.

(2) It is stated by Lord *Thurlow* to be a general rule, that where interest is given against executors for a breach of trust, costs follow of course, *Seers v. Hind*, 1 Ves. jun. p. 294. But Sir *Wm. Grant* was not prepared to accede to that general proposition, as he said there may be many cases in which executors must pay interest, which could not be cases for costs, *Ashburnham v. Thompson*, 13 Ves. 402.

Executors have been made to pay costs where they have been guilty of fraud, or great misbehaviour; as when they refused to sell the good-will of a house, unless they were employed in their trade, *Hild v. Haywood*, 2 Atk. 126; or upon an attempt to support a discharge by forgery, *Parnell v. Price*, 14 Ves. 502; or to conceal the testator's property, *Avery v. Osborne*, Barnard. 352.

Or where money has been kept in their hands without cause; or contrary

to the directions in the will; or has been called in and employed for their own purposes, *Littlehales v. Gascoyne*, 3 Bro. C. C. 73. *Ashburnham v. Thompson*, 13 Ves. 404. *Tebbs v. Carpenter*, 1 Mad. 308. *Roche v. Hart*, 11 Ves. 58. *Piety v. Hall*, 4 Ves. 620. *Mosley v. Ward*, 11 Ves. 581; or where the executor has put his defence on a wrong footing, and his answer has been evasive and contradicted, *Keech v. Kennegal*, 1 Ves. 126; or where he has obtained a release from a legatee without consideration, *Hensley v. Chaloner*, 2 Ves. 85; or where he has denied that he has assets, there being sufficient for the payment of a debt, *Sandys v. Watkins*, 2 Atk. 79: but *secus*, where he has been the representative of two estates, and from that circumstance a confusion has arisen, and his denial of assets has not been positive, *ib.*

An executor, however, may be enti-

tled to costs as to part of the suit, though he may be charged with costs for his misconduct as to the remainder; as where it is necessary to submit a point to the opinion of the court, *Tebbs v. Carpenter*, 1 Mad. 308. *Rashley v. Masters*, 1 Ves. jun. 205. *Blount v. Burrow*, 3 Bro. C. C. 90.

And he is generally entitled to the costs of taking the account, *Newton v. Bennett*, 1 Bro. Ch. Cases 362, unless the account or inquiries be made necessary by his own misconduct; and even in these cases, where there has been a difficulty in separating the costs; *ib.* Or where there has been great uncertainty in respect of the rule by which the executor ought to be charged, the court has neither given or allowed costs, *Raphael v. Boehm*, 13 Ves. 590.

It is a settled rule, that the executor of an insolvent shall not have costs, *Adair v. Shaw*, 1 Sch. & Lef. 280. *Humphry v. Morse*, 2 Atk. 408.

BETWEEN THE SEALS

AFTER HILARY TERM, 1736.

ANONYMOUS. (1)

2 Atk. 1.

A bill depending six years in Chancery, not sufficient to take a debt out of the statute of limitations.

LORD HARDWICKE said, that a bill, though depending in Chancery almost six years, was not allowed to be such a demand as to take a debt out of the statute of limitations; and Sir *Joseph Jekyll*, in a case before him at the Rolls, declared himself to be of the same opinion. (2)

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.

(2) *Craddock v. Marsh*, 1 Cha.

Rep. 205. *Hurdrett v. Calladon*, *ib.* 214. *Anon.* 2 Cha. Ca. 217. *Lake v. Hales*, ante page 7. *Sturt v. Mellish*, 2 Atk. 615. Contra, *Anon.* 1 Vern. 73.

AFTER HILARY TERM, 1736.

BENSLEY v. BENSLEY. (1)

1 Atk. 97.

LORD CHANCELLOR:—Where there is a joint commission against two partners they must be each found bankrupt, and though one of them should die, the commission may still go on; but if one of the joint traders be dead, at the time of taking out the commission, it abates, and is absolutely void.

Joint commission against two partners does not abate by the death of one; but if one be dead at the time of taking out the commission, it is void.

(1) What Lord *Hardwicke* is stated *Atkyns*. It does not appear in Lord to have said in this case is taken from *Hardwicke's* Note-book.

BROWNE v. HIGDEN. (1)

March 19, 1736.

1 Atk. 291.

AN original bill was now brought by a creditor against Mrs. *Higden*, as administratrix of A. who being a married woman, her husband was also made a party.

It is a constant rule, that matters subsequent to the original bill, must come by way of supplemental bill and revivor.(2)

Before the cause was heard the wife dies, and the husband took out administration to his wife, and also *de bonis non*, &c. of A., upon which the plaintiff amended his bill against the husband; to which amended bill the defendant demurred. *For any matter which happens subsequent to the original bill cannot be put into an amended bill*; but a bill of revivor and supplemental bill ought to be brought.

Mr. *Verney* for the plaintiff, insisted, that in equity the suit abated only against the wife, and cited the case of *Humphreys v. Humphreys*, 3 P. Wms. 349, there the bill charged, by way of amendment, matters which arose after filing of the bill, and therefore seemed a proper case for a supplemental bill, and though this was pleaded to the bill, yet the plea was over-ruled; for that such matters may be charged either by way of supplemental, or by way of amended bill.

(1) There is no mention of this case in Lord *Hardwicke's* Note-book; but the above report in *Atkyns* corresponds in every respect with a manuscript report of Mr. *Forrester*.
(2) See *Jones v. Jones*, 3 Atk. 217.

BROWNE

v.

HIGDEN.

Though by the 8th Wm. 3. a suit shall not abate upon death of one defendant, yet it must betaken with this restriction, that the subject matter of the bill is not hurt thereby.

LORD CHANCELLOR :—I am of opinion, that the demurrer ought to be allowed ;(3) for I take it to be the constant rule, that matter subsequent to the original bill, must come by way of supplemental bill and revivor. Besides the suit abated entirely by the death of the wife ; for the husband, who was before joined for conformity only, has an interest now, and though by the statute of the 8th Will. 3rd. a suit shall not abate upon the death of one defendant, but shall go on against the others ; yet it must be taken with this restriction, provided the subject matter of the bill is not hurt by the death of such defendant.

(3) Reg. Lib. A. 1736. fo. 211.

KELSALL v. BENNETT. (1)

March the 19th, 1736-7.

1 Atk. 522.

A. devises the estate in question to B. in tail, remainder to C. in fee, the bill brought by the heir of the body of B. for deeds and writings, and possessions.

The defendant pleads he is a purchaser for a valuable consideration from C. and had no notice of plaintiff's title.

THE bill set forth, that A. made his will, in which he devised the estate in question to B. in tail, remainder to C. in fee, and is brought by the heir of the body of B. against the defendant, for deeds and writings, and to have possession of the estate.

The defendant pleads, that he is a purchaser for a valuable consideration from C., that the plaintiff's father lived in Virginia at the time of the purchase ; that C. was in possession of this estate, and that he had no notice of the plaintiff's title ; for that C. at the time of the purchase, made affidavit, that B. was dead abroad, without issue, and therefore insists he is a purchaser without notice, who may protect himself by plea.

Mr. *Attorney-General* for the plaintiff. Both parties claim under one will, and it appears by the plea, that the defendant knew the plaintiff's father was alive, or that the plaintiff himself, if there was such a person, must of course be entitled.

Besides, it is a denial only of the knowledge of the plaintiff's being in *esse*, not of his title, which they were bound to take notice of at their peril.

(1) There is no mention of this case in Lord *Hardwicke's* Note-book, but the above report of Mr. *Atkyns* corre-

sponds in every respect with the manuscript report of Mr. *Forrester*.

LORD CHANCELLOR:—If the defendant claims under a conveyance, where there was an estate tail prior to the estate under which he purchased, it is incumbent on him to see if that estate is spent. The question here is, therefore, Whether a purchaser can protect himself by plea, without denial of notice of the plaintiff's title. Denial of notice is what gives him power of protecting himself by plea.

Plea over-ruled.

Where defendant claims under a conveyance, in which there is an estate tail prior to the estate under which he purchased, it is incumbent on him to see if that estate is spent, and

therefore over-ruled the plea.

ANGUS v. ANGUS, 1736-7. (1)

March 21, 1736-7.

To a bill brought for possession of lands in *Scotland*, and for discovery of the rents and profits, deeds and writings, and fraud in obtaining the deeds, &c., the defendant pleaded the 19th article of the treaty of union, and that the lands in question, and the matter prayed by the bill were out of the jurisdiction of the court. Mr. *Green* for the plaintiff, cited the case of the *Earl of Arglasse v. Muschamp*, 1 Vern. 75, where relief was granted against a fraudulent conveyance obtained here of lands in *Ireland*; and *Toller v. Carteret*, 2 Vern. 494, respecting a mortgage of the island of *Sark*; and *Sumner v. Acton*.

To a bill brought for possession of lands in *Scotland*, and for discovery of the rents and profits and deeds, and fraud in obtaining them; plea to the jurisdiction of the court, bad, on account of not averring that the parties were resident out of the jurisdiction. (2)

LORD CHANCELLOR:—This court act upon the person as to the fraud and discovery, therefore the plea must be over-ruled. To have made this a good plea, there ought to have been a farther averment, that the defendant was resident in *Scotland*. This had been a good bill as to fraud and discovery if the lands had been in *France*, if the persons were resident here; for the jurisdiction of this court as to frauds, is upon the conscience of the party.

(1) This case is taken from Lord *Hardwicke's* Note-book, and a manuscript report of Mr. *Forrester's*.

(2) If the parties be resident in *England*, the Court of Chancery entertains jurisdiction respecting lands in *Scotland*, *Ireland*, and the *Colonies*, *Toller v. Carteret*, 2 Vern. 494. *Penn v. Lord Baltimore*, 1 Ves. 455.

Lord Cranstown v. Johnson, 3 Ves. 182. But where a charity is to be administered in *Scotland*, the Court of Chancery in *England* does not take upon itself the administration of the charity, *Provost and Bailiffs of Edinburgh v. Aubrey*, Ambler's Reps. 236. *Attorney General v. Lepine*, 2 Swanston's Reps. 181.

As to so much of the bill as seeks possession; the plea over-ruled, without prejudice to the defendant's insisting by way of answer upon the same matter. (3)

I am in doubt as to parts of the bill for relief; for I cannot give the plaintiff possession any other way than by compulsion on the defendant's person, whilst it is within the jurisdiction of the court. However, at present, the plea must be over-ruled, without prejudice to the defendant's insisting, by way of answer, on the same matter against any decree or order being made relating to the possession of the lands in Scotland, as he shall be advised.

(3) The Court of Chancery in England, respecting lands out of its jurisdiction, cannot enforce its decree in

rem, but enforces it by process of contempt in *personam* and *sequestration*, *Penn v. Lord Baltimore*, 1 Ves. 454.

TREBLECOCK'S CASE. (1)

March 22nd, 1736-7.

1 Atk. 633.

The writ *de homine replegiando* is an original writ, and the party may sue it of right.

A MOTION to discharge an order for superseding a writ *de homine replegiando*.

LORD CHANCELLOR:—The writ *de homine replegiando* is an original writ, and the party may sue it of right, and granted here on a motion or petition, without shewing cause.

It is properly returnable in the courts of law, and may be there declared upon; and, as it is remedial, the defendant, against whom it is sued, is obliged to assign some cause why he does not comply with the writ.

Therefore, after it is sued, I do not know that I can supersede it; and if the party who sues out the writ is not entitled to it, it must be pleaded to below: in this case it is the writ of the infant, and there is no suit about the infant here, and therefore the order made to supersede the writ must be discharged.

It might be otherwise, if the infant was in court, by being a party to the suit here.

If this writ is brought by an infant against his testamentary guardian, or by a villain against his lord, I think they may plead the special matter to the writ, and defend themselves at law.

His Lordship granted the motion.

(1) This case is taken from *Atkyns*; it corresponds with a manuscript report of the same case by Mr. *Forrester*.

Ex parte BLUNT. (1)

Ex parte HENCHMAN.

March 25th, 1736-7.

THIS was a suit instituted in the Court of Chivalry against Sir *Henry Blunt*, Baronet, for assuming and usurping without right certain ensigns of arms and crest, contrary to the laws of arms, at the promotion of his Majesty's advocate of this court.

Where, by the sentence of the Court of Chivalry, it was decided, that pedigrees entered in the books of the

College of Arms need not be signed by the parties requesting such entries to be made, for the purpose of making them valid:—this Court will not grant a Commission of Delegates upon an appeal from such sentence, this sentence being neither a definitive sentence, nor such a sentence as is termed in the civil law *gravamen irreparabile*.

In the progress of that cause an allegation was exhibited on the part of Sir *Henry Blunt*, setting forth that all pedigrees must be signed by the proper hands of the parties requesting such entries to be made in the books belonging to the College of Arms, and objecting to the validity of some of the entries in the said books, as not being so signed, and insisting that therefore no credit ought to be given to them.

This allegation the Court thought fit to reject, whereupon Sir *Henry Blunt* preferred his petition to the Lord Chancellor, appealing from this act of the Court as erroneous and a grievance, and praying a Commission of Delegates.

On the other side a cross petition was presented by Dr. *Henchman* as his Majesty's advocate in the Court of Chivalry, insisting that no appeal lies from that Court for any grievance done therein, but only from a definitive sentence or final interlocutory decree having the force and effect of a definitive sentence.

On behalf of the appellant, Drs. *Paul* and *Cotterell* contended, that an appeal to the King in Chancery lies from all determinations in the court of honor; That if an appeal lies from a definitive sentence, it follows that it lies for a *gravamen*, and that the act complained of amounts to a definitive sentence, and they cited *Gregory King's* case in 1702.

(1) The whole of this case is taken from a manuscript report in Lord *Hardwicke's* hand-writing, except the arguments of counsel, which are taken from his Lordship's Note-book.

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He was articted against for irregular practice as a herald. The prosecutor exhibited a libel. He gave a general negative answer. The Court decreed that he should put in a special answer in writing on oath. From this order he appealed, and the result was, that a Commission of Delegates issued, and they reversed the order.

In *Gowne v. Grandall*, the appeal was for a grievance in the rejection of a plea by the Court of Admiralty.

Dr. *Henchman*, advocate for the Court of Chivalry, Dr. *Strahan*, Mr. *Fazakerley*, and Mr. *Murray*, *contrà*. The Court of Chivalry is very ancient. The stat. of Rich. 2. gives a power to the privy counsel to prohibit in certain cases. This Court is governed by the rules of the civil law, 4 Co. Inst. 125.; and by the civil law an appeal does not lie from any grievance, unless it conclude the party. The rule of the Ecclesiastical Courts is, *à quolibet gravamine licet appellare*, but that rule does not extend to courts proceeding by the civil law. *Perezius* calls them *appellationes moratorie*. In Gale's *Praxis*, lib. i. obs. 129, the same doctrine is laid down. Lanfranc, *tit. Interlocutoria Appellationes*, *In quibus casibus quis potest appellare? In quolibet causâ.-fallit in sententiâ interlocutoriâ*. So much for foreign practice. The rules of the Court of Admiralty are applicable to the Court Military; and in Clarke's *Praxis Curia Admiralitatis* it is said, *appellare licet a quolibet sententiâ definitivâ et interlocutoriâ habente vim sententiâ definitivâ; non licet appellare*, for rejecting an allegation, denying a commission to examine witnesses, because these grievances may be set right on an appeal from the definitive sentence.

The question then is, whether this interlocutory order will conclude the parties, or whether it will be examinable upon an appeal from the definitive sentence. Now this allegation may be offered upon such appeal. The books must be laid before the Court, and the objections will then appear. The case of *Gregory King* was of a criminal matter. The Delegates determined that he was not obliged to accuse himself; if he had done so, it would have been irreparable, and he could not have been relieved upon appeal. In *Arthur v. Arthur* a commission of appeal was prayed for, and denied for a grievance.

LORD CHANCELLOR states the case.

9th June, 1737.

This matter has been argued by counsel on both sides, and two questions have properly arisen:—

1st.—Whether an appeal will lie from any sentence or decree of the Court of Chivalry but a definitive sentence, or from such a grievance as is described in the civil law by the term *gravamen irreparabile*, i. e. such an one as if submitted to at first can never be set right after a final sentence in the principal cause.

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2dly.—Supposing it will not, whether the order or act of Court now appealed from be either a definitive sentence, or *gravamen irreparabile*.

1st.—As to the first question. It has been admitted on all hands that this Court proceeds according to the rules of the civil law, except in cases where any special course or practice of the Court breaks in upon it.

Lord Coke in his 4th Inst. 125. is express upon this point. They proceed according to the customs and usages of that Court, and in cases omitted according to the civil law, *secundum legem armorum*.

Fortescue *de Laud. Leg. Angl.* in his 32nd Chapter is to the same effect, and in this respect he puts it on the same footing with the Court of Admiralty. As to the custom or course of this Court of Chivalry no precedents have been cited, nor is it pretended, that there is any particular course or practice on this head to distinguish it from the general rule of the civil law.

This brings the question then to the rule of the civil law concerning appeals, but that must be understood of the civil law as used and practiced in *England*.

It appeared by all the authorities cited, and was fully admitted by the learned Doctors on both sides, that in this the civil and canon law totally differ. That by the civil law no appeal lies but from a definitive sentence or *gravamen irreparabile*; but that by the canon law the party may appeal either from a definitive sentence or any grievance whatsoever.

The authorities upon this subject are numerous and clear, and it is unnecessary for me to repeat them.

To shew this general rule of the civil law to have been received and allowed in *England*, the course of the Court of Admiralty was referred to, and Clarke's *Praxis Curiae Admiralitatis*, a book of very good authority on that head, was cited.

De appellatione à sententiâ definitivâ.

Tit. 53. *Appellare licet à quâcunque sententiâ definitivâ sive decreto interlocutorio habente vim definitivæ sententiæ*

Ex parte sive *vivâ voce apud acta coram iudice tempore latæ sententiæ vel interpositi decreti hujusmodi sive coram notario publico.*
BLUNT.

Tit. 54. *Quod non licet appellare à gravaminibus seu decreto interlocutorio non habente vim sententiæ definitivæ. Licet dederis materiam concludentem defensionis tuæ vel concludentes exceptiones contra testes adversarii; vel infra terminum probatorium petieris commissionem ad partes pro testibus examinandis vel similia, et iudex ea omnia admittere recusaverit, semper practicatum fuit quod non licet ab istis gravaminibus nec à quocunque decreto interlocutorio non habente vim sententiæ definitivæ appellare; quia hæc omnia possunt reparari in appellatione à sententiâ definitivâ, et licet non allegata allegare et non probata probare.*

This is clearly the rule of the civil law as received and practised in *England* in the Court of Admiralty, and is founded on the wisest reason, as it prevents that unnecessary delay which a power of appealing from every imaginary grievance would occasion. I directed precedents to be searched for in the Court of Admiralty, and am informed by the proctors on both sides, that no instance is to be found of an appeal from grievances of this nature.

One case however in the Court of Admiralty, that of *Grandall* and Others against *Gowne* and Others, has been mentioned on the part of the appellants, and of the particulars of that case I have therefore thought it right to obtain the fullest information.

This suit was commenced in the High Court of Admiralty on the 17th of January, 1705, and was heard on appeal before the Delegates on the 7th of March, 1706. It was brought by *Grandall* and Others against *Gowne* and Co. late owners or part-owners of a ship called *Speedwell*, for wages due to them as mariners on board the said ship. They gave in a summary petition or libel, wherein they set forth that the ship was bound on a voyage from the port of London to the East Indies. That they were hired on the part of the owners of the said ship, to proceed on the said voyage, and did their duties on board the said ship accordingly, and set forth that *Gowne* and Co. were owners or part-owners of the ship at the time they were hired and shipped for the said voyage. This libel or summary petition was admitted. *Gowne* and Co. put in their answer upon oath to the said libel, and therein amongst other things insisted, that as to so much of the summary petition as seeks discovery of

their property or interest in the said ship or lading they were not obliged by law to answer, for that by the act of parliament 9 & 10 William 3. it is enacted, that all persons who shall trade to the East Indies without being authorised are subjected to the forfeiture of the ship, cargo, and proceeds, and double the value, one-fourth to the informer, and three-fourths to the Company; and further, that in that they were not qualified to trade there, the discovery tended to subject them to the forfeitures and penalties of that act, in case they had any interest in the ship or lading, and to render them liable to prosecutions in respect of that voyage, which statute they therefore pleaded in bar to the discovery sought for by the summary petition. To these answers exceptions were taken as not being full and plain. On the 16th April, 1706, the Judge decreed the answers not to be full, and that the defendants should answer as to their respective interests in the ship, and whether they were or were not owners at the time of the summary petition. From this act *Gowne* and Co. appealed to the Delegates, and the cause was heard before Lord Chief Justice *Trevor*, Mr. Justice *Tracey*, Mr. Baron *Smith*, and others, who pronounced against the appeal, and remitted the cause, and condemned *Gowne* and Co. in costs.

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This sentence itself is not to be found, so that it does not appear, whether the cause was remitted by reason that no appeal lay from a grievance, or on the merits; and it must be observed, that the case differs widely from the present, for the order or decree there complained of, if it had been a grievance at all would have been fatal and irreparable, if once submitted to.

Of the like kind is the case of *Gregory King*, on an appeal from an interlocutory decree of this Court in 1702. That was in the nature of a criminal cause against a herald for misbehaviour in his office, in having, contrary to his oath and duty, set up a false inscription, with a fictitious pedigree of a family, forging and giving out false arms, and endeavouring to procure false certificates to support all this. His proctor put in a general negative answer. The prosecutor insisted that he should answer on oath. The Court of Chivalry determined that he should answer on oath. From this decision he appealed to the Queen in Chancery, and the appeal was allowed.

But that case is very different from the present. That was a *gravamen irreparabile*, for if he had once answered

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it would have been too late, and the grievance could never have been redressed upon appeal.

The next question then is, admitting that an appeal will not lie from any sentence but a definitive sentence, or such a grievance as is *gravamen irreparabile*, whether the order or decree appealed from in this case be either the one or the other? I am of opinion that it is not. It is from an act of the Judge rejecting an allegation upon a point of evidence. The substance of the allegation is this, that by the laws of the College of Arms all pedigrees must be signed by the proper hands of the parties requesting such entries, to be made in their books, that some of the entries produced are not so signed, and therefore not entitled to any credit.

Consider the nature of this allegation. It is rather of a matter of law than of fact, and if so, it must necessarily be open on an appeal from a definitive sentence. The law of the College of Arms is strictly so. The usage and practice of the College of Arms is inquirable of from the officers both in the inferior and in the superior court on appeal. On trials at common law, the question of admitting or rejecting heralds' books as evidence is always treated as a point of law, and is determined on reasons of law, and authorities without any examination of fact. So in 1 Salk. 281., the case of *Stainer* and the Burgesses of *Droitwich*, on a trial at bar, Mich. 7 W. 3. B. R.

But it may be said, that this question of law may possibly be mixed with fact; it may be necessary before you can come at the law to enquire into usage, and usage is fact. If that should be so, then this may be set right on an appeal from the definitive sentence, and the Judges delegates on that appeal may admit this allegation, or an allegation of the like import, and give the party leave to examine upon it.

This case is not near so strong as some of the cases put by Mr. Clarke in his 54th Title, which I have cited.

It is objected, that the *Lord Chancellor* is not to try the merits of the cause in order to determine whether an appeal lies. True; but he must determine whether an appeal lies or not. It is not proper for me to determine whether the Judge below has done right or wrong in rejecting this allegation on the merits of it, neither do I; but it is proper for me to determine whether, supposing he has erred, an appeal will lie at present or not. These are two distinct questions.

It is no doubt proper in doubtful cases to let a commis-

sion go, and possibly it will be said, that no great mischief will ensue from so doing in the present case. It may be so, but what weighs greatly with me as to that part of the case is, the precedent which I should thereby establish. It would be of ill consequences to allow these dilatory appeals. The same rule must hold for the Court of Admiralty, where cases of great value, and in which dispatch is most necessary, sometimes come.

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For these reasons I am of opinion that no commission ought to issue, and that the petition of Sir *Henry Blunt* must be dismissed.

EASTER TERM,

EDWARD JACKSON, an Infant Son of	}	Plaintiffs; (1)
EDWARD JACKSON and MARY his		
Wife, and FRANCES JACKSON, Ex-		
cutors of MARY,		
and		
ANN JACKSON, Widow, WILLIAM	}	Defendants.
JACKSON and EDWARD JACK-		
SON, the Father,		

April 28, 1737.

THE bill was for the performance of the trust of the marriage articles of plaintiff's father and mother, and that the sum of 3,500*l.* might be paid and placed out for the benefit of the infant, notwithstanding the disposition in *Mary Jackson's* will.

1 Atk. 513.

Where stock standing in the name of a trustee was by marriage articles, (to which the

trustee was a party) settled as money at the value which the stock then bore, and was therein stated to have been paid to the trustee who gave a receipt for the money indorsed upon the marriage articles, but which stock had never in fact been sold out:

Held that the trustee was not liable for a loss which was incurred by the stock not having been then sold out. The stock in the mean time having fallen in value.

In May 1720, the plaintiff's mother purchased 500*l.* South Sea Stock, which was transferred to her mother, the defendant *Ann Jackson*, as a trustee for her daughter.

In June 1720, the marriage between plaintiff's father and

(1) This case appears in Lord *Hardwicke's* Note-book, but being incorrectly stated by Mr. *Atkyns*, it is cor-

rected by Lord *Hardwicke's* Note-book and the Register's Book. The judgment is taken from *Atkyns*.

JACKSON
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mother was treated of, and by the marriage articles bearing date the 9th of April last, but which were admitted to be antedated, and to which *Ann* and *William Jackson* were parties, after reciting that *Mary Jackson* was, amongst other effects, possessed of the sum of 3,500*l.* principal money, and that it was agreed that all the produce thereof should be applied to her sole and separate use, and that she had that day paid and deposited the said sum of 3,500*l.* in the hands of *Ann* and *William Jackson*, on the trusts thereafter mentioned. It was by this deed agreed, that the said *William* and *Ann Jackson* should place out the said sum of 3,500*l.* at interest, and should pay the interest to the sole and separate use of *Mary Jackson* for her life. The trustees were empowered, by the direction of *Mary Jackson* to call in the 3,500*l.*, and to place it out again on new securities; and *Mary Jackson*, was empowered, with the consent of the said *William* and *Ann Jackson*, by writing under her hand, or by will to dispose of this money as she should think fit; and there was a proviso therein contained, that no part of the principal money should be disposed of to the use of the said defendant *Edward Jackson* the father, without the consent of the defendants *Ann* and *William Jackson*, in writing under their hands and seals first had and obtained for that purpose; it being the intent of all the said parties that the said principal money should, as much as might be, be preserved entire, to be disposed of by the said *Mary Jackson* among the children that she might have by her husband, and not to be lessened or disposed of for any other purpose in the lifetime of the said *Mary*, unless the same, by any unforeseen accident became needful in the judgment of the said *Ann* and *William Jackson*, for the necessary support of the said *Edward Jackson* and *Mary Jackson*. On the back of the marriage articles there was a receipt under the hand of the said *Ann Jackson* for the sum of 3,500*l.*

Mary Jackson lived only about four years after the marriage, and by her will she directed the 3,500*l.* to be placed out upon good security, and gave the interest of the 3,500*l.* to her husband for his life, and the principal to the infant plaintiff; and if the infant should die, she gave the whole to the plaintiff.

Some short time before *Mary's* death, 1,000*l.* of South Sea Stock was sold by the trustees, and part of the produce, amounting to 500*l.* with the consent of *Mary Jackson*, was paid to her husband, for the purpose of making up his stock

in a trade which he was about to carry on, but the residue of the South Sea stock was not sold out. *Ann Jackson* paid to her daughter several sums of money in her lifetime, on account of the South Sea stock, but they were not such sums as amounted to the dividends of the stock, or the interest upon the money, and *Mary* gave receipts to her mother for the sums she received, but the receipts did not express on what account they were given. The plaintiff alleged by his bill, that prior to the articles it was proposed by *Mary Jackson* that the South Sea stock should be settled, but that upon proposing the same to her mother she disapproved of it; but declared that they should send to the exchange, and as the price of the stock then happened to be, she the said *Ann* would warrant the same, and that the settlement should be made, not of the stock, but of the money. That *Mary* and *Edward Jackson* agreed to the proposal, and a person was sent to the exchange, who brought back the price, and that the 3,500*l.* was settled according to the price of the stock. *Ann Jackson* by her answer admitted that a sum certain was agreed to be inserted in the settlement according to the then value of the stock, but denied that she ever agreed or intended to warrant the price or value of the said stock. *Ann Jackson* admitted that she had sold 100*l.* South Sea stock, but denied that she had sold the residue of the said stock. The only evidence produced at the hearing was the receipts given by *Mary Jackson* to her mother, and the marriage articles.

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The stock having greatly fallen, one question was whether *Ann Jackson* should be answerable for the whole sum of 3,500*l.*, or for the present value of the stock only; and on her behalf it was contended, that as *Mary Jackson's* fortune laid in that specific stock, it ought to be considered as consisting of such stock, and not of money.

LORD CHANCELLOR.—This is a mere falling of stock without the trustees' neglect, and therefore comes under the last clause of the statute of Geo. 1. made for the indemnity of guardians and trustees, which provides, "That if there be diminution of the principal," without the default of the trustees, they shall not "be liable."

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It has been said, that after the stocks fell, the trustees paid interest for 3,500*l.*, amounting to much more than the produce from the dividends, and therefore to a demonstration it appears to be a trust for money.

But it is well known, that during the golden dream, people

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were so infatuated as to look upon imaginary wealth as equally valuable with so much money.

It has been said, that long after the falling of the stock, the defendant, *Anni Jackson*, continued paying the same interest.

But still it does not answer either way, for it does not amount to the common rate of interest, and yet is more than the dividends of the fallen stock; and to compel trustees to make up a deficiency, not owing to their wilful default, is the harshest demand that can be made in a court of equity.

Notwithstanding, antecedent to the marriage, it was agreed by the defendant to take the stock at 750, and a transfer made accordingly; yet this court will never oblige a trustee to acquiesce under so hard and unreasonable a contract.

Mary Jackson in her will recites the deed of settlement, and her power of devising.

The counsel for the plaintiff insist the devise to the husband is illegally made, and not pursuant to the power, and have endeavoured to shew, from the whole tenor of the marriage articles, she had no power of disposing of any part of the money for the benefit of her husband, to the prejudice of the infant, the plaintiff, and rely principally upon the following proviso:

“Provided nevertheless, that no part of the principal money shall be applied to the use of the said *Edward Jackson*, without the consent of the trustees under hand and seal, to the end that this sum may be kept intire for the advantage of the infant.”

I am of opinion that Mrs. *Mary Jackson* had no power to dispose of the principal, to the prejudice of the infant, but in one particular circumstance; therefore the disposition she has made is not pursuant to the power.

Where a father is sufficiently competent, the Court will give no directions with regard to an infant's maintenance.

The father of the plaintiff appearing to be sufficiently competent, his Lordship would give no direction with regard to her maintenance, for he said, that whether an infant should have an allowance of maintenance during the life of the father, depends always upon the particular circumstances of the case. (1)

(1) Whether children shall have an allowance for maintenance in the lifetime of the father, depends upon the situation, circumstances, and ability of the father, and the fortunes of the

children. See *Buckworth v. Buckworth*, 1 Cox's Reports 80. *Jervoise v. Silk*, Cooper's Reports, 52. *Maberly v. Turton*, 14 Ves. 499.

His Lordship ordered that the plaintiff's bill, so far as it seeks to compel *Ann Jackson* and *William Jackson* to answer for the sum of 3500*l.* principal money, as the value of the 500*l.* South Sea stock be dismissed, and his Lordship doth declare, that the sum of 500*l.*, part of the produce of 1,000*l.* South Sea stock sold, and which was paid to the father of the plaintiff, the infant, was not paid pursuant to the trust, and ought not to be allowed out of the trust-money, and that as to the disposition made by the will of *Mary Jackson* of the principal trust-money, so far as the same concerns her husband, is a void disposition, not being according to the marriage articles; and his Lordship doth order, that the said *Ann Jackson* answer before the Master for what is due for the dividends of the 400*l.* South Sea stock, and all the additional stock and the annuities which have been the produce thereof, and for the interest of the 500*l.* at 4 *per cent.* from the death of *Mary Jackson*. And it is ordered, that what is coming from the said *Ann Jackson* on the said account, together with the said sum of 500*l.*, the produce of the said 1,000*l.* South Sea stock sold, be placed out at interest in the names of the said *William* and *Ann Jackson*, for the benefit of the infant plaintiff on the trust in the said articles; and they are to declare the trust accordingly. (2)

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(2) Reg. Lib. A. 1736. fo. 412.

SIR RICHARD FRANCIS MOORE, }
Bart. } Plaintiff; (1)
and
LADY MOORE, his Wife, and LORD }
SCARBOROUGH, a Trustee of their } Defendants.
Marriage Settlement }

April 28, 1737.

By the marriage settlement, upon the marriage between Sir *Richard* and Lady *Moore*, he, in consideration of marriage, and her portion of 6,000*l.*, conveyed certain pre-

1 Atk. 272.

Sir Richard
Francis Moore,
in considera-

(1) The statement of this case is taken from Lord *Hardwicke's* Note-book. The arguments of counsel, and the judgment (with some additions and corrections from Lord *Hardwicke's* Note-book) from *Atkyns*.

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tion of marriage and a portion conveys lands to trustees

for ninety-nine years if he should so long live, upon trust to pay 100*l.* per annum for the separate use of his wife. The wife, in 1728, many years after the marriage, upon disputes with her husband relative to her pin-money, and the legacy given to her by her mother, eloped from her husband and went to live in France. In 1734, the annuity being considerably in arrear, the trustees bring an ejectment to recover the term. At a subsequent period in the same year the husband brings a suit in the Ecclesiastical Court for restitution of conjugal rights, in which a sentence of excommunication is passed against the wife for not appearing. Upon a bill brought by the husband for an injunction to restrain the proceedings in ejectment. Held, under the circumstances of the suit in the Ecclesiastical Court being not instituted until eight years after the elopement, and subsequent to the ejectment brought by the trustees, of the husband having never made any offer to the wife that she should return, and of his having paid the money to his wife some time after the separation, that the Court would not interfere to prevent the payment of the annuity, notwithstanding the husband by his bill offered to receive his wife again, and in that case to pay her the annuity. (2)

The marriage took place in 1707; they lived together twenty years, and there were fourteen children of the marriage, of whom eleven were living.

In 1713, Lady Moore's mother died, and by will bequeathed a moiety of her personal estate to Lady Moore, of which 1,500*l.* was to be for her separate use.

In January 1728, Lady Moore privately eloped from her husband, and from that time continued to live in France. Sir Richard continued to pay the 100*l.* per annum up to the end of that year, and in 1729, in a petition presented in a cause relative to the personal estate of Lady Moore's mother, he complains of his wife's elopement, but states that he pays her 100*l.* per annum pin-money; and that he is ready to continue the payment thereof.

In Easter Term 1734, a declaration in ejectment was delivered on the part of the Earl of Scarborough, the executor of the surviving trustee of the late Earl of Scarborough, for the purpose of recovering the term by which the annuity was secured, considerable arrears being then due. And at a subsequent period of the same year, Sir Richard commenced a suit in the Ecclesiastical court for a restitution of conjugal rights, in which a sentence of excommunication was passed against Lady Moore for contumacy, in not appearing.

(2) See *Mildmay v. Mildmay*, 1 Vern. 53. See *Sidney v. Sidney*, 3 P. Wms. 269. 2 Eq. Ca. Ab. 29, pl. 37. *S. C. Blunt v. Winter*, 3 P. Wms. 276. note 2. *Watkins v. Watkins*, 2 Atk. 96. *Clarke v. Periam*, 1 Atk. 337. *Lee v. Lee*, 1 Dickens. 321. *Ball v. Montgomery*, 4 Bro. C. C. 339. S. C. 2 Ves. jun. 191. *Atherton v. Nowell*, 1 Cox's Rep. 229. *Wright v. Morley*, 11 Ves. 12. *Seagrave v. Seagrave*, 13 Ves. 439. *Buchanan v. Buchanan*, 1 Ba. & Be. 203.

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The object of the present bill was for an injunction to restrain the proceedings in the action of ejectment, upon the ground that Lady Moore, by her elopement, had forfeited her title to the annuity. That the plaintiff is ready to receive her again, and in that case is willing to pay her the annuity, and that as she is out of the jurisdiction of the spiritual court, a temporary suspension of the payment of the annuity will be the only means of compelling her to return to her family.

On the part of the plaintiff, evidence was produced of general good conduct on his part towards his wife, and of want of temper, but no improper conduct on hers, except that some of the witnesses stated that she kept up a private correspondence without her husband's knowledge, to which they attributed some of their quarrels. On the part of the defendant, several witnesses deposed that the pin-money and the legacy from Lady Moore's mother were the principal causes of their disagreement. The plaintiff, insisting that the two together amounted to more than she ought to receive, and wishing her to give one up; and she expressing her apprehensions that he wished to take her money from her, and that he had given strict orders to the servants not to go on any messages for his wife without first coming to him, and had been heard to express himself with much bitterness against her for not giving up the pin-money.

For the plaintiff in this case, Mr. *Attorney General* and Mr. *Taylor* insisted upon these two points,

First, That his wife, by her misbehaviour, in causelessly deserting her family, had forfeited her pin-money.

Secondly, That it was intended for her only to spend in her family.

Upon which it was argued, that by the marriage contract she is obliged to cohabit, and that failing in this, she had broken the contract on her part, and ought not to have her annuity, and that therefore it is equitable to restrain her till she returns and lives with her husband, and behaves as she ought to do, and that he has no remedy to get her back, but by stopping this pin-money.

That this allowance was only to promote harmony between the plaintiff and the defendant, and to enable her to do acts of bounty to her family, therefore, when the reason for it ceases, the allowance ought to cease likewise.

That in many cases the Court has interposed to make a provision for a wife, on the misbehaviour of the husband;

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pari ratione, they ought to interpose where the wife misbehaves, as in the cases of *Colemore v. Colemore*, and *Oxenden v. Oxenden*, 2 Vern. 493; and that, in the present case, the lady's deserting her family in the manner she has done, is a sufficient reason for the Court to interfere so far as to stop the payment of the pin-money, in order to induce her to return to her duty.

Mr. Brown, Mr. Fazakerley, and Mr. Cox, for the defendant, argued, that these three considerations naturally arose upon the case :

First, Whether the settlement shall be taken strictly; or whether it shall be taken to intend a benefit to the defendant, on condition only of cohabitation.

Secondly, If to be construed conditionally only; then, whether on cruel usage, she is not justifiable in separating from her husband.

Thirdly, Whether the usage here has been such as may justify her separation.

They argued, that, according to the words and legal operation of the deed, there is a provision at all events for the defendant of 100*l.* a-year, and *quoad hoc*, she is to be considered as a *feme-sole*, and as a stranger to the plaintiff; and to take in other matters extrinsic, and not appearing from the words of the deed, would be judging of another deed, not of this. In the case of wills, which generally allows the greatest scope, in order to let in the intent, the construction has always been bounded and circumscribed to the words, for the general rule has uniformly been, that unless the intent can be collected from the words, it is in vain to urge it, for that otherwise it would be making a man's will, not construing it, and deeds are to be construed more strictly, and the rule of law is, that they are to be taken most strongly against the grantor, and most beneficially for the grantee.(1) That *nemo contra factum suum proprium venire potest*, 2 Inst. 66; but to come into the construction contended for on the part of the plaintiff, would be to invert both these rules.

In *Astry v. Ballard*, 2 Mod. 193, it is said, men's grants must be taken according to usual and common intendment, and where words may be satisfied, they shall not be restrained further than they are generally used, for no violent construction shall be made to prejudice the right of any one, contrary to the plain meaning of the words.

(1) 5 Co. 7 b. and Co. Lit. 183 a. and 197 a.

If the words then in the present case are to govern, they are so express and plain, that they leave no room for construction, and to put a meaning upon them, contrary to the plain sense, would be bringing things to the utmost uncertainty. In *Edricke's* case,(1) the judges said they would not make a construction against express words, and yet there was a strong equity in that case, to induce them to do it.

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If, in the present case, the defendant stood in need of the aid of this Court, from any defect in her settlement, it might with some colour of reason be said, that she had forfeited her right to it by her elopement; but even in such a case, though it appeared that a wife had lived in open lewdness, yet she was not dismissed with such an answer; for in the case of *Mildmay v. Mildmay*, 1 Vern. 53, and 2 Chan. Cases, 102, the plaintiff, a *feme covert*, who had 50*l.* *per annum* settled on her by her husband, to be paid out of certain rents, suggested by her bill that he had, on purpose to defraud her of this annuity, procured the tenants to surrender their estates, on which the said rents were reserved, and prayed that it might be made good to her by a decree of the Court; and notwithstanding it appeared that she was a very lewd woman, and had eloped, the *Lord Chancellor* ordered, that the husband should stand in the place of the tenants, and admit the rent payable, and she to recover it at law as well as she could; there the settlement was merely voluntary, and after marriage, and the wife charged not only with elopement, but open lewdness, and yet it was thought reasonable to decree in her favour, and give her such relief, that without it she must have failed at law. In the present case, the settlement appears to be upon the highest considerations, that of marriage, and a large portion, and the utmost charged upon the lady is a bare elopement; if therefore, in *Mildmay's* case, it was reasonable to aid her legal remedy, *a fortiori*, it would be unreasonable in the present case, to restrain her from pursuing it.

As to the offer of the plaintiff to receive her, and on her return to pay the annuity, there are many cases, where such an offer, against the express contract of the party, has been rejected, as in the case of *Seeking v. Crawley*, 2 Vern. 386; and numberless more to the same purpose: For if a man will, with his eyes open make a bargain, that he afterwards finds reason to repent of, he is not entitled to relief here, it

(1) 5 Co. 118 b.

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is the effect of his own folly, and he must take the consequences.

It may besides be material to consider, what species or kind of offence it is that the defendant stands charged with ; it is at most but a simple elopement, which is an offence not taken notice of, or any way punishable by the law of the land. By the common law, a wife was entitled to dower, notwithstanding an elopement accompanied with adultery, and though by the statute of *Westminster* (1) adultery and elopement are made a bar to dower, yet it has always been taken so strictly, that the one without the other, has often been held to be not within the statute (2), certainly both together, though a bar to dower, would be no bar to her claiming a provision made for her by a jointure ; and though, in the Spiritual Court, the husband may sue her for restitution of conjugal rights, and for refusal she may fall under the censures of the church, yet that is not in respect of elopement, for such a suit may be as well where there is a cohabitation, as otherwise.

To say then, that in equity she is punishable, or that she might in this respect be deprived of any legal privileges, would be to set up an arbitrary legislative power in the Court to declare offences, and to punish them by no other measure than its own discretion.

That a woman is justifiable in deserting her husband where he uses her with cruelty, cannot be disputed ; but then another question will arise, whether the usage which the defendant hath met with in the present case, be sufficient to justify her conduct or not ?

It appears evident from the proofs on both sides, that there were continual quarrels between the plaintiff and the defendant about the pin-money, and they became so public, that one witness swears, the plaintiff himself declared, his wife had been advised by a clergyman to go away from him ; and many of the witnesses fully prove, that the plaintiff divested her of all kind of management, and made her not only as a cypher in his family, but took from her even the respect due to her from his servants ; whether this be such usage as may justify her conduct, must be submitted.

It is observed in *Puffendorff*, in his book of the law of nature and nations, in the chapter of marriage, that in case a

(1) West. 2. ch. 34.

(2) Perk. pl. 335. Fitz. Abr. tit. let. H.

Dower, pl. 153. Fitz. N. B. 150.

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husband denies his wife the respect due to her sex, and her relation, so as to shew himself not so much a kind partner, as a troublesome enemy, it should seem very equitable that she might be relived by divorce. *Barbeyrac*, in his note, cites, to confirm this, the *Theodosian Code*, Lib. 5. tit. 17.

In the laws of our own country, there are hardly any footsteps to go by, or on which it may be said with any certainty, what is cruelty in the husband. In the case of the wife of one *Cloborne*, Hetley. 149, it was so far held, that spitting in her face was cruelty in the husband, that the Court refused to grant a prohibition to the Spiritual Court, on a suit for a separation, and alimony, founded on this cause, and said by *Richardson*, chief justice, certainly the matter alledged is cruelty, for spitting in the face is punishable in the *Star-Chamber*.

There is no ground for this Court to interfere; the defendant is a purchaser of this annuity for a valuable consideration. The husband has contracted to pay it at all events, and has given a legal remedy for it. The defendant asks nothing of this Court, but stands upon her legal title.

There is no proof of any application to her to return. As to the secret correspondence by letter, without the privity of her husband, there is no such charge to be found in the bill. The excommunication for contumacy was subsequent to the ejectment, and it does not appear that any notice was given to her, or to any attorney or agent for her.

LORD CHANCELLOR :—This is entirely a new case, and I do not remember any like it that hath ever yet come in question; none have been cited, and I believe there are none; but it is not this, or any other difficulty in the case itself, that makes it necessary for me particularly to speak to it, but because some things have been mooted of a much higher nature that require it. April 28, 1737.

The points to be considered are,

First, Whether in any case this Court ought to restrain a legal remedy, which a wife, or her trustees have, to recover a separate maintenance against the husband?

Secondly, If from the evidence, in the present case, there be any reason to lay this restraint upon the defendant?

Upon the first it has been argued, that the defendant has causelessly deserted her family, and stood out contumaciously against the proceedings in the Spiritual Court.

Though this be a bill *primæ impressionis*, I incline to think, though I do not give any opinion to bind myself,

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there may be cases, where a husband would be entitled to come into this Court, to restrain the trustees of his wife, by a decree here, from proceeding at law for her separate maintenance; and it would be reasonable to do this, especially when she elopes, and lives in adultery out of the jurisdiction of the Ecclesiastical Court, for that would be defeating their power; and there have, I believe, been cases where there has been a sentence for alimony in the Spiritual Court, in which this Court has awarded *ne exeat regnum* in aid of the spiritual jurisdiction.

These separate maintenances are not to encourage a wife to leave her husband, whatever his behaviour may be; for, was this the construction, it would destroy the very end of the marriage contract, and be a public detriment.

If a wife should elope, and be guilty of adultery, or a criminal conversation, or should leave her husband without any cause, and the Ecclesiastical Court can only punish her for contumacy, but she is entirely out of their reach as to any other punishment, I should think a husband right in his application to this Court, to prevent her trustees from proceeding at law to recover her separate maintenance; but then the relief must arise from a very plain case, where there is a criminal conversation plainly proved, and plainly put in issue.(1)

But this is not the present case, for here is no incontinence, and nothing but the bare elopement is put in issue. I do not like the evidence of private correspondence, nothing of that sort is charged, I therefore can take no notice of it, but it looks like an attempt to cast an aspersion without any ground. This case then will turn upon the second point, whether, upon the circumstances of this case, there is any reason to lay such a restraint upon the defendant.

Two things have been urged in behalf of the plaintiff:

First, That the wife has eloped without any cause.

Secondly; That she has been duly summoned in the Ecclesiastical Court on the part of the plaintiff, for restitution of conjugal rights, and has continued in contumacy; and as she has been thereupon excommunicated, which is all the Ecclesiastical Court can do, as she is out of their jurisdiction, the husband cannot have any fruit from his suit there.

As to the first, I am afraid these separate provisions do often occasion the very evils they are intended to prevent;

(1) See the cases cited in note (2) of this case.

and if the plaintiff hath made his wife uneasy in respect of the pin-money, and the legacy given by her mother, as there is great reason to believe he did, though this will not justify her going away, yet it may be an excuse.

This bill seeks to deprive the wife of a legal right, on account of her voluntary elopement, when probably that very right may have been designed for that very purpose, and to provide for the wife, if such dissension should happen between the parties as would be a just inducement for them to separate, though their quarrels should not be of such a nature as to enable her to obtain a legal separation for cruelty, and that seems to be the present case.

As to the objection, that the plaintiff can have no effect from his ecclesiastical suit, I lay no great stress upon it, for it was not instituted in the Spiritual Court till eight years after her going away, and after the ejectment brought by the trustees; and though the Spiritual Court only fix citations upon the church door, or some other place, yet the husband, who knew where she was, might have given notice to her, or at least to her attorney who was employed in the suit at law. It has therefore, the appearance of not being founded, on any desire in Sir *Richard Moore* that his wife should return, but on an attempt to prevent the payment of the annuity.

I do not find that the husband has ever made any application to the wife, since she separated, to induce her to return, and therefore this case is distinguished from *Whorwood v. Whorwood*, 1 Ch. Ca. 250, because there the husband, before the bill brought, offered to be reconciled, and desired to cohabit with her and use her as his wife; nor was there any separate maintenance in that case on the contract of the parties.

There is another thing that has great weight with me, the husband's paying the annuity since the separation, for six months after the wife was gone from him; when she petitioned the Court for other money upon a different trust, he, upon an application by a cross petition to stop this, expressly says, that he had constantly paid her the annuity ever since she left him, and offered to continue it; This is a strong presumption that he thought at least she was excusable in separating herself from him.

These being the circumstances of the case, I am of opinion and declare, that on the proofs and circumstances in this cause, there is not any sufficient foundation for the general relief prayed by the bill, against the payment of the annuity

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or rent-charge of one hundred pounds a-year, but that the plaintiff is entitled to be relieved against the ejectment already brought on the terms hereafter mentioned. I therefore decree, that the Master take an account of the arrears of the annuity, and tax the defendant's costs at law, and upon the plaintiff's payment of what shall be found due for such arrears and costs, at such time and place as the Master shall direct, and continuing the growing payments of the said annuity, according to the marriage settlement, the injunction to be continued; but in default of payment of the arrears of her annuity and costs at law, the injunction to be dissolved, and the plaintiff's bill dismissed with costs; and in case the plaintiff shall make default in continuing the growing payments of the annuity, then Lady Moore is to be at liberty to apply to the Court. Whereupon such order shall be made as shall be just, and it is ordered, that the plaintiff do, in a fortnight's time, pay to the defendant's solicitor 100*l.* on account of the arrears of her annuity now due to her. (1)

Mr. *Attorney-General*, after the decree was pronounced, said, this was so uncommon a case that probably it would never happen again.

LORD CHANCELLOR replied, if you think so, you must have a very good opinion of the ladies; for

In amore hanc omnia insunt vitia, injuriæ,
Suspiciones, inimicitia, induciæ,
Bellum, pax rursum.

(1) Reg Lib. B. 1736. fo. 314.

GRAVES v. EUSTACE BUDGEL, Esq. (1)

May the 5th, 1737.

1 Atk. 444.
This Court will allow the proving of exhibits *vidæ voce* at the hearing, but not to let in other examinations, and this only at the application of the party who is to make use of the exhibits, but no instance where it is allowed on the application of the contrary party.

It was moved on the defendant's behalf, that certain witnesses of the plaintiff's who were to prove exhibits, might be examined *vidæ voce* at the hearing of the cause; and that an order of the late *Chancellor*, for a commission to examine them in the country, might be discharged.

(1) This case is taken from *Atkyns*; it is not to be found in Lord *Hardwicke's* Note-book.

The motion was founded on two things :

First, The great importance of these exhibits to the merits of the cause, being receipts of the defendant, which he insisted were forged, and had denied in his answer.

Secondly, The ill state of health of the defendant disabling him to go down into the country to attend the commission, in support of which an affidavit of his physician was read.

On these matters it was prayed, that the witnesses might be examined *viâ voce* at the hearing, that the defendant might have an opportunity of cross-examining them, and sifting their evidence; and a case of the Duchess of *Newcastle* was mentioned by Mr. *Fazakerley*, where it was so allowed. This was also prayed in honour of the defendant, he having denied the receipts.

LORD CHANCELLOR :—I cannot allow the motion; the constant and established proceedings of this Court are upon written evidence, like the proceedings upon the civil or canon law. This is the course of the Court, and the course of the Court is the law of the court; and though there are cases of witnesses being so examined, yet they have been allowed but sparingly, and only after publication, where doubts have appeared in their depositions, and the examination has been to clear such doubts, and inform the conscience of the Court.

There never was a case where witnesses have been allowed to be examined at large at the hearing; and though it might be desirable to allow this, yet the fixed and settled proceedings of this Court cannot be broke through for it.

The utmost latitude the Court has taken in this, is to allow the proving of exhibits, *viâ voce* at the hearing, but not to let in other examinations; and this is allowed only where the application is by the party who is to make use of the exhibits; but there never was a case where it was allowed on the application of the contrary party; if he is suspicious of fraud, he has notice, and may cross-examine the witnesses.

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BUDGEL.

WARNER and OTHERS, Executors of }
 EDWARD HENKIN Deceased, and } Plaintiffs; (1)
 THOMAS HYAM, }
 and
 WATSON and VILLERS, Assignees of }
 EZEKIEL WOOLLEY, a Bankrupt, } Defendants.

May 6th, 1737.

2 Atk. 4. THE bill was brought in order to have an account of the dealings and transactions between *Henkin*, *Hyam*, and *Ezekiel Woolley*, and to be admitted as creditors to a proportionable share of the dividends under the commission of bankruptcy against *Woolley* for what shall appear to be due on that account.

On the 25th February 1717, *Woolley* borrowed 500*l.* of *Henkin* on bottomree, and agreed to pay 26*l. per cent.*, which he secured on bills of sale and bills of parcels of the cargo of a ship belonging to him, and which was to be paid from the time of the loan until the goods were safely landed in London; and the principal was to be discharged, when the remittances from the ship and produce were sold; and after the landing of the goods in London, till such sale was completed, only 5*l. per cent.* interest was to be paid by the borrower; and if the goods and returns should prove not to be sufficient to pay the principal and interest, *Woolley* was to make good the deficiency, and it was agreed that *Henkin* should have notice from the factors in what ships the returns were sent, so that he might insure, and in case such notice should not be given then he was not obliged to make any deduction in respect of any loss which might happen; *Woolley* executed a bond in the penalty of 1,000*l.* for performance of covenants, and the lender was to choose the goods on which the risk was to be run; there was a proviso, if the whole goods were lost, then the principal was to sink entirely, or, if only a part of them, then to abate proportionably. On the 26th January 1718,

(1) This case is imperfectly stated in *gister's Book*. The judgment is taken from *Atkyns*. It is corrected by Lord *Hardwicke's Note-book* and the Re-

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29th of April 1719, and the 24th of July 1719, three other sums of 500*l.* each were borrowed at the same rate of interest, and subject to the same stipulations, and in which three last-mentioned loans *Hyam* was equally concerned with *Henkin*.

In 1722, Mr. *Woolley* became a bankrupt, his assignees insisted this was a very unreasonable agreement, and ought not to be carried into execution; that the covenants were very unusual ones, and the interest very exorbitant, especially as *Henkin* was to have 5*l. per cent.* on the goods after they were actually come home, and therefore they insisted they have done right in refusing to admit the executors of *Henkin* as creditors, as they have ordered a sum to be retained to satisfy the demand, if they should be eventually entitled to it. In November 1729, Mr. *Henkin* preferred a petition to be admitted a creditor, which Lord *King* dismissed. In 1735, the creditors preferred a petition to have this claim disallowed.

Lord *Talbot* ordered that it should be disallowed unless *Henkin* filed a bill within a certain time, which being done by the present suit,

Mr. *Brown*, Mr. *Owen*, and Mr. *Belcher* for the plaintiffs, argued, that it must not be considered as a case of common interest, because this is a casualty, where the principal is risked and may be lost; that 25*l. per cent.* was the common and ordinary interest on bottomree to the East Indies, and 22*l. per cent.* to the West Indies.

That the voyage to the West Indies, where this ship was bound was a very dangerous one; and besides there is a very great hazard of the sugars being very considerably damaged by the sea washing away a great part of it.

Though goods are lost in bottomree contracts, yet if the bottom of the ship come home, the contractor here is liable to make them good.

That common bottomree agreements run for a certain time, as suppose for eight months, though the ship return in six months, yet the 26*l. per cent.* still goes on, till the eight months are expired.

Or the bottomree interest is paid, till the whole remittances and produce are sold, though the ship be returned; but here, as soon as the ship arrives in the harbour, the bottomree interest was to cease, and only common interest to commence.

That the risk here was double, for it was run upon the

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goods that were sent out, and likewise upon the goods that were to be remitted.

That *Woolley* continued in trade till 1722, and never complained of this agreement, and that it had been in part performed by the plaintiff's receiving several sums by returns of goods.

Lord Chancellor.—I do not at all wonder that *Woolley* is broke, and then turning to Mr. *Attorney General* said, do you insist for the assignees under the commission of bankruptcy, that this is an usurious contract; for if you can make it doubtful whether it is usury or not, I will direct an issue to try it at law.

Mr. *Attorney General* for the defendants the assignees. We do not insist that in strictness of law this contract is usurious, but that it is unreasonable and unconscionable,—the money lent was only 2,000*l.*, and yet 1,455*l.* is now claimed.

One hundred and seventy-nine pounds *Henkin* actually received, and 500*l.* 19*s.* 4*d.* was all the produce from 900*l.* worth of goods carried out.

The contract seems to be quite of a new nature, for the counsel of the other side do not pretend to shew any instance of such an agreement.

They endeavour to compare it to the case of a bottomree bond; if it was really so, I would not dispute the point with them, because in that case, the custom of merchants has made it a reasonable and proper contract.

There is no hazard at all run here by any loss which might ensue from the insolvency of a factor; for if that had been the case, the 26 *per cent.* does not cease, but *Henkin* is still entitled to have it continued till the principal is satisfied.

The goods returned, whether of sufficient worth or not, were to satisfy fully the money lent at 26 *per cent.*, and the fact was, they fell short in value: and if *Woolley* had not been a bankrupt, he must have paid the 26 *per cent.* to this day.

Therefore the terms of this contract are upon the face of it unreasonable.

There is a time too during the time the goods are in port when there is no hazard run, and yet the lender shall have his 26 *per cent.* notwithstanding; besides too, the time is uncertain when the contract shall end.

By the common form of bottomree bonds, your Lordship will see what merchants think a reasonable contingent security.

If the ship return in a stipulated number of months, as in

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the case of an East India voyage, in 36 months, and in the case of a West India voyage, in 16 months, the contract may possibly run at 26 *per cent.* for the 36 months, but then it cannot possibly be extended any further, but ought to be confined to so many of the 36 months as are run out before the ship arrives.

Here the risque is run during the whole time the ship is in port, as well as out of port; and, in the present case, the lender runs no risque if the goods are lost, for there is a proviso in the present agreement, that Mr. *Henkin* shall have notice on what ship these goods are put on board, so as he may insure them, which he might do at 6*l.* *per cent.* at most.

In this case here was no risque run upon the loss of the ship; but in the common case, though the goods are saved, and the ship lost, the lender must suffer.

LORD CHANCELLOR.—Mr. *Attorney-General*, will you agree to allow the executors of Mr. *Henkin*, upon the contract, interest at 26 *per cent.* during all the time, except when the goods were upon land.

Mr. *Attorney-General*, on behalf of his clients, desired time to consult them as to this proposal: Lord *Hardwicke* said, I tell you beforehand, I will not carry this contract one jot further than I am compelled to do by the strict rules of this Court; and in the mean time adjourned it to the first day of causes in the next term.

In Trinity term, 1737, the cause came on again, when Lord *Hardwicke* was pleased to order, by the consent of the defendants, and of the plaintiff *Hyam*, that it be referred to Master *Edwards* to take an account of what is due from *Ezekiel Woolley*, the bankrupt, to the plaintiffs, the executors of *Edward Henkin*, and to the plaintiff *Thomas Hyam*, on the several contracts; and in taking the account, the Master was directed to allow the plaintiffs 26 *per cent.* for the sums lent in respect of the risque of the goods mentioned in the contracts during the voyages outward and homeward; and as to the homeward bound voyages, the 26 *per cent.* is to be computed only in proportion to the value of the goods remitted in such respective voyages; and at the rate of 5 *per cent.* only for the rest of the time mentioned in the contracts, during which any allowance of interest was thereby agreed to be made down to the time of the bankruptcy of *Ezekiel Woolley*: and the Master is also to take an account of what the plaintiffs or *Edward Henkin* received in money or goods toward the said principal and

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interest, which is to be applied first to sink the interest, and then the principal ; and for so much as shall be found due to the plaintiffs on this account, they are to be admitted creditors under the commission of bankruptcy against *Woolley*, and to receive a satisfaction for the same, in proportion to the rest of his creditors. (1)

(1) Reg. Lib. B. 1736. fol. 524.

ATTORNEY-GENERAL at the RELATION of the MASTER, &c. of UNIVERSITY COLLEGE, OXFORD . } Plaintiff;
and
Dr. STEVENS, Dr. RIDLEY, and EDWARD HARLEY, and the other TRUSTEES of Dr. RATCLIFFE's Will } Defendants. (1)

May 11, 1737.

1 Atk. 358.
2 Eq. Ca. Ab.
196, pl. 17.

Dr. Stevens having been elected under *Dr. Ratcliffe's* will a traveling-fellow, receives the salary for five years, and instead of traveling abroad for five more, as the will requires, upon ill health resigns, after having been absent from *England* only six weeks, and the trustees accept the resignation, and put another in his room. This is a dispensation with the condition; it might have been otherwise if they had refused to accept the resignation.

DOCTOR RATCLIFFE by his will dated 13th September, 1714, gave all his estate in Yorkshire to his executors, upon trust to pay thereout yearly 600*l.* to two persons, Masters of Arts, and entered on the physic line, to be elected out of the University of Oxford, by, &c. for the maintenance of such two persons for ten years, and no longer ; the half of which time they are to travel beyond sea for their better improvement : and he gave the surplus of that estate to University College. He also gave 5,000*l.* to his executors for building the front of University College, the master's lodge, and chambers for these two fellows.

Whether the traveling-fellows must be members of a particular college, and whether they have power to let their chambers, are not objects of the Court's decision, but ought to be determined by the visitor.

Dr. Stevens was regularly elected to one of these traveling-fellowships on the 17th July, 1725, and from that

(1) The statement of the case is taken from *Lord Hardwicke's Note-book*. The judgment from *Atkyns*.

time till the 17th July, 1730, received the salary of 300*l.* *per annum.*

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During that time, Dr. *Stevens* lived in a noble family, and received a salary for his employment therein, and on the 17th of July, 1730, having been absent from *England* only six weeks, he tendered his resignation in writing to the electors on a suggestion of ill health, which was accepted by a majority of them, and another person was elected in his place.

The object of the information was to make Dr. *Stevens* account to University College for what he had received since his election, and to have the directions of the Court as to the manner of holding and repairing the chambers. The latter part related to Dr. *Ridley*, the other traveling-fellow, who admitted that he had let his chambers, although he was resident in *England*, and the questions as to him were, whether he had a right so to do, and whether the traveling-fellows were bound to repair their chambers.

On the part of Dr. *Stevens* evidence was adduced to shew that he had, since his election, applied himself to the study of physic—that he had really intended to travel, and that he was now unable so to do, from the bad state of health into which he had fallen.

The *Attorney-General* and Mr. *Pauncefort* in support of the information, contended that the traveling was a condition annexed to the gift of the 300*l.* *per ann.* and had not been performed.

Mr. *Browne*, Mr. *Fazakerley*, Mr. *Green*, and Mr. *Murray* for Dr. *Stevens*, contended that Dr. *Stevens* had been prevented from traveling by ill health, by necessity, and not from choice. That the will gives to the fellows the option of what period of the ten years to begin their travels. That the time not to be employed in travelling was given to enable them to go through a proper course of studies which would naturally precede the travelling, and in which it is proved that Dr. *Stevens* was employed. He was never called upon by the electors to proceed upon his travels.

If he had died the claim now set up might have been as well insisted upon against his executors, and if it had prevailed in this case would affect all those Fellows who after the limited time resign their fellowships instead of taking orders. Here the intention of traveling was *bond fide* en-

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tertaind, and there is no evidence of fraud. That the acceptance of the resignation by the trustees amounted to a dispensation with the obligation to travel, and this information was not filed until five years afterwards.

The *Attorney-General* in reply, admitted that there might be a reasonable excuse for not traveling; but that in this case, there was not sufficient evidence of ill health, and as to the resignation, contended that the electors had only a power of nomination, and no right to accept of a resignation; and that they might not have been aware of the circumstances of this case.

11th May, 1737. LORD CHANCELLOR.—The *Attorney-General* is certainly a necessary party, and the information is properly brought in his name.

Nothing, to be sure, should be done in this Court, to invalidate the design of this donation; and on the other hand, I must proceed in such manner as I am warranted to do, by the rules of law or equity.

There are three considerations in this case :

First, What is the intention and true construction of Dr. *Ratcliffe's* will.

Secondly, Whether that has been complied with by the defendant Dr. *Stevens*.

Thirdly, If not, whether the non-compliance with it has been such as to give a right to the relators to recover back the money in a court of equity.

Dr. *Ratcliffe* by his will gives several manors, upon trust *inter alia*, to pay 600*l.* yearly, to two persons, who shall be elected out of the physick line, by the Archbishop of Canterbury, &c. for their maintenance for the space of ten years, in the study of physick, and to travel half the time for their better improvement, and in case they should die, or the place be vacant, then the vacancy to be filled up by two others, and the whole overplus to University College.

I think if the defendant had forfeited, the College would certainly be entitled to it, let it come to them by any means whatsoever. But as to the construction of Dr. *Ratcliffe's* will, it was manifestly the design, that they should travel, and that they should travel five years; but it is truly said, there is no particular time appointed when they should begin their travels.

The words are, “the half of which time they shall spend in traveling for their better improvement,” and therefore it

is most natural to intend that he meant the last five years for their traveling, because he imagined they would, in the first part of the time, be laying in a proper stock of knowledge.

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But then it can never be understood that he intended in all events they should travel, for there might be accidents which would utterly incapacitate them for travelling, and therefore he did not expect they should refund when such accidents happened, but left it at large to be judged of by the circumstances; besides, this is given not only for the expence of traveling, but for other views likewise, for maintenance, &c.

The next question, whether Dr. Stevens has complied with the intention of the donor.

Now it cannot be said, that Dr. Stevens has complied with Dr. Ratcliffe's intention; but then it must be considered, whether he has a reasonable excuse for not doing it, and upon this there is no doubt, but that natural disabilities will excuse, such as becoming *non-compos*, sickness, or other natural disabilities. But then it has been insisted upon, that the defendant has fraudulently accepted of this employment, in order to put the money in his pocket, without any intention ever to do the duties of it. If this had been proved, I should have no doubt but that I might decree the defendant to refund; but this is not the case, for there is not one single circumstance given in evidence to shew he took it upon such a fraudulent design; instead of that, there is very strong proof to the contrary, even by persons of good credit in the profession, that he had diligently applied himself to the study of physick, and besides, that he was in an ill state of health, in a wasting and decayed condition, which threatened a consumption; and even supposing he was actually able to travel, but in his own mind did not think himself capable, yet he would not be guilty of a fraud, for an imaginary as well as a real distemper would equally incapacitate him.

I do not think the clause in the will can possibly amount to a condition, but is merely directory, that half of the time they shall travel, and is not like an executory consideration: as where A. pays money upon such a consideration, and it is not performed, an action at law lies for A. for money had and received to his use, which is expressed thus by the Scotch law, *causa data sed non secuta*.

The agreement is to pay 300*l.* per annum for ten years, if during that time he travel five years: will the not traveling

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oblige him to refund? No! unless the electors had suffered him to continue in this post the whole ten years, then possibly the relators would have had a right to call him to an account, and might have obliged him to refund for five of the years.

Doctor *Stevens* communicated his illness first to the Archbishop of *Canterbury*, and lodged a formal resignation with him. I think the trustees are the electors, and the persons whom Doctor *Ratcliffe* intended should have the whole management of this donation. They stand in his place in this respect and they have accepted of this resignation, without insisting upon Doctor *Stevens's* going on, and it is certainly a dispensation of the condition. If they had said we will not accept of this resignation, but you must comply with the terms, or refund, then the case would have appeared quite different; but, instead of that, they have accepted of the resignation, and actually put another in his room.

Therefore I think as Doctor *Stevens* has taken the burthen of this upon him, and as at the end of five years the trustees accepted a surrender from him, and did not insist then on his refunding, it would be unreasonable to require it now.

But even if it was a condition, yet suppose this case, a patron presents to a benefice, and takes a bond, as he may, from the presentee to reside for ten years, and he after five years are expired, should resign the living for the residue of the term, and the patron accepts it, and presents another, no one will say that he has forfeited the annual income of this living, during that part of the ten years he was resident upon it, for the acceptance of the patron has dispensed with the breach of the condition, and no action could be maintained on the bond.

Therefore I should think it too hard in the present case, to decree an account against the defendant.

There are two other points.

First consideration, Whether the traveling-fellows must be members of the college.

Secondly, Whether they have a power to let the chambers which they hold in the right of their fellowship.

As to these matters, they are not properly the objects of this court's jurisdiction, but ought rather to be determined by the visitor, and the will besides is extremely incorrect in this respect.

As to the being members of *University College*, it is natural to suppose no body would reside in the college, unless they were actual members; but this is out of the case, for Doctor *Stevens* has complied with that part of it.

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And as to the power of letting their chambers, I do not think that Doctor *Ratcliffe* has laid his fellows under greater restrictions than those of other colleges are liable to; and if I was to inquire whether a fellow of a college has a right to let his chambers, I should make wild work, and give an opportunity to half the University to bring bills against particular persons to discover, whether they have not forfeited their fellowships by thus letting out their chambers.

Decreed the information to be dismissed, but without costs, as against Doctor *Stevens* who has had a very large benefaction already from Doctor *Ratcliffe's* donation, and University College, but the information to be dismissed with costs as against Doctor *Ridley*.

ATTORNEY-GENERAL at the relation of
the OVERSEERS of the Parish of St.
NICHOLAS, and two of the Principal
Inhabitants

Plaintiffs;

and

THE MAYOR, ALDERMEN, and BUR-
GESSES of the BOROUGH of WAR-
WICK, and several of the ALDERMEN
in their private capacity

Defendants.(1)

May 13 and 20, 1737.

THE information was brought in relation to three estates or funds, which were called and insisted upon to be charity estates.

Where by a royal charter two markets, two fairs, a court-house,

and a booth-hall for the sale of merchandizes, together with the tolls and profits of the market are granted to a corporation to be held *ad usum et profectum burgi et burgentium*: This cannot be considered as a grant for a charitable purpose, but must be applied to the public use of the corporation; but to what uses it must be applied the members of the corporation are the judges uncontrolled by this court.

A decree in a suit against a corporation made with their consent upon a report of two judges of assize, to whom the court had referred it, cannot upon an information founded upon that decree be varied, the corporation by their plea and answer relying upon that decree.

Where the funds of a charity had not been applied or the accounts passed pursuant to the directions of a decree; under the circumstances of there then being no fund, and of the present members of the corporation having only followed the steps of their predecessors, and in order to avoid litigation and expense, the court directed the accounts to be taken from the period of six years before the filing of the information.

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book.

The judgment and decree verbatim from a manuscript in his Lordship's handwriting.

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1st. Certain lands and tithes granted to the corporation by charter of 15th of *May*, 37 Hen. 8.

2d. The tolls and profits of markets, and rents and profits of the booth-hall, granted by a charter of 12 *November*, 1 & 2 Philip and Mary.

3rd. Sir *Thomas White's* charity.

The information complained of great abuses and misapplication of these estates by the corporation, and that no accounts had been regularly taken, and prayed that a general account might be taken, with a retrospect for an indefinite space of time. That the corporation might make satisfaction in their corporate capacity in the first place, and that the members of the body who were made defendants in their natural capacities, might make satisfaction for the particular misapplications they had been personally concerned in.

The property under the first head, at the time of the grant, was worth only 58*l.* 13*s.* 4*d.*, but had encreased to above 600*l.* *per annum*, and was granted by the Charter of Incorporation, in which the incorporating clause is *pro universo commodo et communi utilitate inhabitantium burgi prædicti*, and afterwards the lands are said to be granted *pro consideratione prædictâ*.

The property under the second head, was held under the charter of Philip and Mary, which grants two markets, and several other franchises, a court-house, and a booth-hall, for the sale of merchandizes, together with the tolls and profits of the market, and these are expressed to be held *ad usum et proficuum dicti burgi et burgentium burgi prædicti*.

Sir *Thomas White's* charity consisted of money secured to the corporation by a deed of 6th of *July*, 5 Edw. 6. for the purpose of being lent upon loans without interest, to a certain description of persons for the term of nine years, without taking any profit to themselves for so doing.

In the year 1613, a bill was exhibited by one *Hunt* and others against the bailiff and several of the principal inhabitants of the town of *Warwick*, relative to certain funds, including those granted by the charter of Hen. 8. but not mentioning those granted by the charter of Philip and Mary; and on the 10th of *November*, 12 Jac. 1. 1614, the cause was heard, and a commission was directed to Sir *Clement Fisher* and others, who by their certificate, proposed a scheme for occupying the charity estate, and managing the charity for the future; and on the 30th of *October*, 1615, it was decreed by Lord *Ellesmere*, that the certificate should be con-

firmed and established, and the several matters therein contained be performed by all parties, with some variations and explanations.

An information was afterwards filed by the *Attorney-General* against the corporation in their corporate capacity, charging a misapplication of certain of the charity revenues and estates comprised in the charter of Hen. 8., which, when it came on to be heard, the court referred it to two justices of assize, who on the 4th of *June*, 4th Car. 1., made their report, prescribing a proper application and management of the charity funds; and amongst other things, that the accounts should be annually passed before two justices of the peace for the county of *Warwick*. This certificate of the justices of assize, the bailiff and burgesses of *Warwick*, by a petition to the *Lord Keeper*, prayed might be carried into effect by a decree, and on the 17th of *July*, 13 Car. 1. a decree was pronounced accordingly.

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The defendants to the present information, as to the fund under the charter of Hen. 8., insisted by plea and answer, upon certain stated accounts as having been properly passed according to this decree of 13 Car. 1.

The *Attorney-General* and Mr. *Browne*, in support of the information, contended that the fund under the charter of Philip and Mary, had not been applied at all to charitable uses.

2dly. That the fund under the charter of Hen. 8. had not been administered according to the decree of 13 Car. 1. but had been misapplied, and that the accounts of all the charities had been kept together, and had not been annually or otherwise properly passed. 3. That the money under Sir *Thomas White's* charity, had been lent to persons who were not the objects of the charity, and for longer periods than nine years, and that the corporation had taken fees for the loans, of all which evidence was adduced.

Mr. Serjt. *Parker*, Mr. *Pauncefort*, Mr. *Fuzakerley*, Mr. *Noel*, and Mr. *Taylor*, for the corporation, contended that the grants of Henry 8th, and of Philip and Mary, were made to the corporation for their own benefit, and to preserve government and order in the town, and not for any charitable purposes. That the corporation were not parties in their corporate capacities to the suit in which the decree of 1615 was pronounced, and that they therefore cannot be bound by it. That the decree of 1615 is erroneous in directing the application of the surplus of the fund which ought not

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to have been considered as a trust. That that decree includes the premises granted by the charter of Philip and Mary, although there was nothing in the bill relating to them, and they are not mentioned in the decree of 13 Car. 1. That the Court in that suit delegated its authority to the justices of assize, which it ought not have done. That the petition of the corporation to confirm the Judges' certificate cannot be construed as a consent, because the decree varied from the prayer of the petition; and there being nothing under the common seal, the corporation cannot be bound.

Where a decree cannot be carried into execution by the process of the court, but a new bill and a new decree becomes necessary, the Court will exercise its own judgment, and will not ground its proceedings on a former erroneous decree. *Lawrence v. Berney*, 1 Ch. R. 8^o. 127. Eq. Ca. Ab. 166. *Johnson v. Northey*, Prec. Ch. 134. *Brockman v. Randall*, Trin. 1734.

But supposing these decrees to stand, that the accounts have been regularly kept and passed as thereby is directed, at any rate the Court will not decree such a retrospective account as is prayed, *Duke of Marlborough v. Strong*, May, 1721, in the House of Lords, 2 Bro. P. C. 302. In the case of *Newark*, Lord Talbot refused to decree an account further back than the filing of the bill.

As to Sir *Thomas White's* Charity, it is not proved that any of the more immediate objects of the Charity ever applied for, or wanted the loans. The fees taken by the corporation were only for the securities upon which the loans were secured.

Mr. *Beotle* and Mr. *Wilbraham* for the defendants in their natural capacities. There is no evidence of any of the defendants having applied any part of the funds to their own private use. It is not shewn who were present at the several assemblies where the acts complained of were done. All those who were present and consenting to those orders, and the representatives of those who are dead, ought to be parties. A trustee for a charity is not to be charged further than a trustee in a private trust, *Man v. Ballet*, 1 Vern. 44.

Mr. *Attorney-General* in reply:—In whatsoever sense the charter is to be considered, it is clear that the corporation ought to apply the profits to some public use, for the benefit of the inhabitants in general, and cannot apply them to their own private use. There is no other way of calling the defendant to account, and this Court has a right to

see the profits applied according to the intention of the Crown.

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The decree which the corporation now complain of was not only founded on their own consent, but their defence to part of this information is, that the accounts have been passed in pursuance of the directions of that decree. It is however clear from the evidence that these accounts have not been so passed, and that they cannot stand.

LORD CHANCELLOR.—Information brought in relation to three estates or funds which are called and insisted upon to be Charity Estates.

20th May, 1737.

1st.—The lands and tithes granted to the corporation by the charter of the 15th May, 37 Hen. 8.

2nd.—The tolls and profits of markets, and rents and profits of the Booth-hall, granted by charter 12th Nov. 1 & 2 Ph. and Mary.

3rd.—Sir *Thomas White's* Charity :—

Information complains of great abuses and misapplication of these estates by the corporation.

That no accounts have been regularly taken.

Prays a general account, with a retrospect for an indefinite space of time. That the corporation may make satisfaction in their corporate capacity in the first place.

That the members of the body who are made defendants in their natural capacity, may make satisfaction for the particular misapplications they have been personally concerned in.

I shall begin with that estate which I mentioned in the second place ; The tolls and profits and markets and other premises granted by the charter of Philip and Mary, in order to deliver the cause from it. I am of opinion, that there is no ground to call that a Charity Estate, or to direct it to be accounted for and applied to the uses charged in this information.

The grant is contained in a royal charter of confirmation, giving the corporation further franchises, and amongst others two markets, two fairs, a court-house, and a booth-hall, for the sale of merchandises, together with the tolls and profits of the markets, and these are to be held *ad usum et proficuum dicti burgi et burgentium burgi prædicti*. This imports no more than to the use and behoof of the corporation ; No particular charity, nor any thing that is commonly understood by the term charitable use is expressed or implied in it.

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It must indeed be applied to a public use of the corporation or borough; the members cannot put the profits into their own private pockets, but they are the judges to what public uses it shall be applied; and this Court, according to its present rules, cannot controul it. There is no proof that they have sunk these profits, or put them into their own pockets, but on the contrary, it seems to be agreed on all hands that they have given them as salaries to some of their officers, and it is not improper for them to do so.

To this, however, the directions in Lord *Ellesmere's* decree have been objected; but the answer to that is that no question relative to these profits was in issue in that cause or in any before the court. It is therefore impossible that that decree can be carried into execution as to that part.

It has been insisted upon by Mr. *Attorney-General* in reply, that still this is a proper subject for an information in the name of the *Attorney General* in this court to have this estate managed, and the profits applied according to the intent of the crown; and this is true in case it had not been applied to public uses or misapplied and converted to the use of private persons; but if that be not the case there is no ground for this court to interpose in estates thus generally granted to corporations. *City of London—Town of Newcastle.*

It follows that as to the premises granted by the charter of Philip and Mary, the information must be dismissed.

The part of the case which comes next to be considered concerns the estate granted to the corporation by the charter of 37 Hen. 8.

This estate is granted in the charter of incorporation; The incorporating clause is *pro universo commodo et communi utilitate inhabitantium burgi prædicti*, and afterwards the lands are said to be granted *pro consideratione prædictæ*. It has been much debated at the bar whether these words would operate to make those lands and premises applicable to the charitable uses mentioned in the information, and if this were *res integra* I should have great doubt about it; but I think that point is not now open, but determined and concluded by the decrees that have already passed. As to Lord *Ellesmere's* decree of 14 Jac. 1., the corporation not being before the court in their political corporate capacity, I think they are not bound by it; and therefore no further use can be made of the decree in this cause than as an ancient exposition or construction of the grant of King Henry

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the Eighth, and of the intention of the donor ; and contemporary or even ancient expositions of old grants of the crown, which are frequently expressed in general words, have always great weight. But the main stress of this cause as to this estate rests on my Lord *Coventry's* decree, 13 Car. 1.

That was a proper suit to establish a charity in the name of the *Attorney-General*, the bailiff and burgesses were defendants in their corporate capacity, and therefore they and their successors are as much bound by that decree as private persons in their private capacity, would have been.

By that decree, the rents and profits of the estate granted by king Hen. 8. are directed in the first place to be applied to certain particular uses therein specified, and that the surplus thereof shall be disposed and employed by the corporation for the time being to the uses following, *viz.* " For and towards the repair of the church and
" school of *St. Mary's*, in *Warwick*, and for and towards
" the binding of poor children, born or bred in the town
" to be apprentices, and for and towards the relief of
" the poor and aged people of the said town, and for and
" towards the repair of the Great Bridge there leading
" over the river *Avon*, and to and for such other religious, good, and charitable uses tending to the general
" good of the town and ease of the inhabitants thereof, as
" the bailiff and burgesses for the time being shall think
" meet and convenient ; It being hard now to express and
" foresee all such particular accidents and occasions as afterwards
" may produce or to restrain them from the performance of any good work when they have means to
" perform the same." Afterwards follow the directions touching the method of accounting.

Against the force of this decree many objections have been made, some of which go to the steps the court took in making the decree, and others to the substance of it.

First, it is said that the court delegated their authority to the justices of assize ; but in fact there was no delegation of authority. The reference recites a treaty for an accommodation, and was made to prepare matters, and to put them into this method, in order to bring the parties nearer to an agreement. In those days it was a frequent practice to award commissions and make references which are now disused. If such objections were allowed to old decrees many would be overturned. It is right to allow proceedings

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their proper force according to the course established at the time they took place.

Secondly as to the substance and justice of the decree.

In those days this court exercised a more large and liberal jurisdiction over charities than it is now in the habit of doing. Many ancient charities where the grants of the lands are in general words, subsist as to the particular applications of them under such decrees. It would be dangerous now to overturn them.

Besides this is an original bill founded on that decree, and intended to carry it on. That decree therefore cannot be varied in this suit, nor in any manner without an appeal or bill of review; for if that were to be done there might be two inconsistent decrees relating to the same estate, and between the same parties, standing on the records of this court at the same time, which cannot be.

It is said that the present not being a bill of review, but an original bill to have the benefit of and to carry on the former decree, the defendants are at liberty to object to the justice of it, and that the court may look into it and depart from it; and upon this head several cases have been cited.

Those cases were very proper to the point to which they were applied; but even on the general doctrine there has been considerable difference of opinion between very great judges who have sat in this court.

In the present case there are two things which entirely deliver this cause from that question. The first of them is that the decree was made with the consent of the corporation, for the certificate of the judges of assize was made a decree on their own petition praying that it might be so; and a corporation may bind their successors as much by consenting to a decree as in any other way. The condition or restriction which the court rejected went only to one particular, which was the increase of the maintenance of the vicar of *St. Mary's*, and did not affect the rest.

But secondly what puts all these objections entirely out of the case is that the defendants have in their plea and answer relied on this decree, and pleaded that they have regularly passed their accounts under it.

Both sides agree that this is to be the rule, and therefore the defendants cannot be at liberty at the bar to take exceptions to it.

The next question is as to what relief the relators are

entitled, and how far the stated accounts ought to stand in their way.

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As to the stated accounts they are plainly not pursuant to the directions of the decree.

Instead of being passed annually, in some instances, the accounts for fifteen years were passed together. The accounts are not of the rents and profits of the estate granted by Hen. 8. in particular, nor of the particular disposition thereof, but only the receiver's accounts of the whole corporation estates. They do not shew what payments have been made out of this estate; but the whole is mixed and jumbled together. It appears that the justices of the peace were not informed of the rule and measure by which they were to take this account, for they neither saw nor read that part of the decree. The consequence of that is that they could not know what they were about.

If it should be said that this is not very material, provided the application of the trust estate has been right, that draws on another objection, that a plain misapplication appears; for it appears that the particular uses to which the surplus is directed to be applied have not been sufficiently regarded, and great numbers of the items allowed in the accounts are to quite different purposes, and not at all warranted by the decree.

The charity estate has been mortgaged, and the interest of those mortgages and great sums for the principal have been allowed for which there is no colour.

The consequence of which is that an account must be decreed.

The only question that remains is as to how far back and with what particular directions this account is to be decreed.

It is prayed that the account may be carried back for twenty years before the filing of the information; but I do not think it proper or for the benefit of either side to do that. The misapprehension of or variation from the decree of 13 Car. 1. has subsisted long in the corporation and is not the fault of the present particular members alone. They have followed the steps of their predecessors.

There is no evidence of their having put any part of the money into their own pockets. The vicar of St. Mary's was present at passing the accounts, and the inhabitants on whose behalf the present information is brought were no strangers to it.

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For these reasons, and to avoid unnecessary expense and vexation, I shall take a shorter period and borrow the rule of the statute of limitations. I would not however be understood to lay it down that the statute of limitations is a bar to a charity or a trust. Certainly not, but in these cases the court must exercise a discretion; and this is more necessary to be done in regard to these changeable bodies than in any other cases, and I think it right to make the rule of the statute of limitations, the measure of my discretion in this case: with regard to Sir *Thomas White's* charity some enquiries must be made.

Decree. As to the account and relief demanded touching the premises granted by the letters patent of king Philip and queen Mary, let the information be dismissed.

As to the estate granted by the letters patent of king Henry 8. and any houses or lands purchased by the corporation with any part of the rents and profits of that estate, I declare that the rents and profits thereof ought to be disposed of and applied to the charitable and good uses mentioned in the decree of 17 July, 13 Car. 1. and to be accounted for according to the directions of that decree, and that the accounts insisted upon by the defendants in their plea and answer have not been passed pursuant thereto.

But in regard to many circumstances appearing in this cause, and in order to prevent fruitless expense and litigation between the parties, I do not think fit to direct an account so far backwards as is sought by the information; and therefore decree that the defendants do account before the Master for the rents and profits of the said charity estate since the first day of December, 1727, six years before the information filed.

Let the Master enquire what mortgages have been made, or suffered to be subsisting on the charity-estate during that period of time, and what was the consideration of such mortgages, and how the money borrowed was applied, and whether the same or any part thereof hath been paid off, and out of what fund, and what sum of money now remains due and unsatisfied on any such mortgage or mortgages.

Let the Master also enquire whether the salary of the mayor or any other officer of the corporation hath been augmented out of the rents and profits of the charity estate, and state the same to the court.

Let the Master also enquire and certify which of the defendants were mayor or aldermen of the said corporation

during any and which of the years, for which the said account is directed, and what other persons have been mayors or aldermen during any and which of the said years.

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If any balance of the rents and profits of the charity estate shall be found in the hands of any of the defendants, unapplied to the purposes mentioned in the said decree, let the Master examine and certify in what manner the same may be best applied for the benefit of the charity, and all parties are at liberty to lay proposals before him for that purpose.

As to the management of the said charity for the future, let the Master examine and certify whether any and what augmentations are proper to be made of the particular annual stipends directed to be paid by the said decree, and what surplus will remain of the annual produce of the said charity estate after such augmentations made, and let all parties be at liberty to lay proposals before him for this purpose.

And I do further order that a particular account of the rents and profits of the said charity estates distinct from other revenues of the said corporation be made up and passed annually according to the directions of the said decree, and that at the respective times of passing such annual accounts, a copy of the said decree be laid before and read over to the two justices of the peace who shall respectively pass the same.

As to Sir *Thomas White's* charity—Decree that the same be established according to the intent of the donor declared in the deed of the 6th of July, 5th Edw. 6. and that the Master take an account how much money arising from that charity was on the first day of November, 1727, in the hands or custody of, and what sums have been since received by, the said corporation or of any of the defendants or of any other person for their or any of their use or by their or any of their order or authority and how the same hath been disposed of. And how much money arising from that charity is now standing out on loans and to what persons, and whether such persons are qualified to enjoy the same according to the directions of the deed of the 6th of July, 5th Edw. 6. and the intention of the donor, and let the securities for the same be brought before the said Master; and if any part of such money shall appear to be standing out on loans not pursuant to the directions of the said deed, or is on any other account fit to be called in let

ATTORNEY- the Master appoint a proper person to call in the same;
 GENERAL. and to put the securities which have been taken for the same
 v. in suit if it shall be necessary; and if any loss shall appear
 MAYOR OF to have happened of any part of the said money arising
 WARWICK. from this charity, let the Master certify by what means
 such loss hath been occasioned; and let what is now or
 shall come into the hands of the defendants or any of them
 or of any, &c. be placed out, &c.

Reserve all further directions and the costs of this suit
 till after the Master's report.

All parties to be at liberty to resort to the court as occa-
 sion may be. (1)

(1) Reg. Lib. A. 1736. fo. 377.

CHARLES HUMPHREYS, Administrator
 of the goods unadministered of his Sister,
 MARY SCARLET, Widow of WILLIAM
 SCARLET, and formerly the Wife of
 JOHN OSBORNE, Deceased
 and
 THOMAS BULLEN and ANN, his Wife,
 Administratrix of the said WILLIAM
 SCARLET, who was Administrator of
 the said MARY SCARLET

Plaintiff; (1)
 Defendants.

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2 Eq. Ca. Abr. *A.* survives her first husband, who left her a legacy, and
 425. pl. 21. intermarries with *B.* She dies, the legacy being unreceived
 11 Vin. Abr. by *B.* during her life, but after her death he took out admi-
 88. pl. 26. nistrators
 1 Atk. 458.

A. survives her first husband, who left her a legacy; she dies, the legacy being unreceived by the second husband during her life, but after her death he administers, and dies before the legacy came to his hands; the administrator gets it in, and the administrator *de bonis non* of the wife brings this bill for the legacy.

Equity considers the administrator *de bonis non* as a trustee for the administrator of the husband, who having an absolute right by surviving his wife, his administrator ought to have the benefit of it (2)

During the coverture, husband and wife are but one person; but when she dies he has a right to administer exclusive of all other persons.

(1) This case is taken from *Atkyns*, 378. and *Cart v. Rees*, cited in 1 P. Wms. 381. *Elliot v. Collier*, 1 Ves. 15. except the last sentence, which is taken from Lord *Hardwicke's* Note-book. and see *Hargrave's* and *Butler's* Co.

(2) So *Squib v. Wyn*, 1 P. Wms. Litt. 351 a. n. (1).

administration to her, but died himself before the legacy came to his hands, and his administrator gets it in, and the administrator *de bonis non* of the wife brings his bill to have this legacy, received by the administrator of the husband, paid over to him as the legal representative of the wife.

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Mr. *Attorney-General*, for the plaintiff contended, that a husband and wife in law are but one person, and consequently no relation, nor entitled to administer.

LORD CHANCELLOR.—During the coverture they are but one person; but when that coverture is dissolved by the death of the wife, the husband is certainly the next friend and nearest relation, and has a right to administer exclusive of all other persons. At common law no person at all had a right to administer; but it was in the breast of the ordinary to grant it to whom he pleased, till the statute of the 21st of H. 8. which gave it to the next of kin; and if there were persons of equal kin, whichever took out administration was entitled to the surplus; and for this reason the statute of Distribution was made, in order to prevent this injustice, and to oblige the administrator to distribute.

May 18, 1737.

The question here is, whether the administrator *de bonis non* of the wife, or the administrator of the husband, is entitled to this legacy.

I think clearly it was a vested interest in the husband, and therefore his administrator, as his representative, is entitled to it, without being obliged to make distribution, for the husband is not within the equity of the statute, and it is explained besides by the last clause in the statute of Frauds and Perjuries: section 25. “And for the explaining an act of this present parliament, intituled, ‘An Act for the better settling intestate’s estates,’ be it declared, that neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate; but that their husbands may demand, and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.”

Notwithstanding, by the rules of the common law, the administrator of the wife is entitled to it, being a chose in action, not received or got in by the husband in his lifetime, yet equity will consider such administrator as a trustee for the administrator of the husband, for the husband having an absolute right to it by surviving his wife, his administrator ought to have the benefit of it. The credits of the wife

HUMPHREYS survive to the husband, and go in equity to his representative, and not to the administrator *de bonis non* of the wife, **v.**
BULLEN. who is only a trustee for the other; and therefore the plaintiff's bringing this bill is a breach of trust, and I dismiss it with costs, and decree accordingly.

For the plaintiff was cited *Burnet v. Kinnaston*. (1) And for the defendants, *Huntley v. Griffith*. (2)

(1) P. in Chan. 118, and in 2 Vern. 401.

(2) Mo. 452.

POWELL, senior and junior Plaintiffs; (1)
 and
JOHN MONNIER, deceased, the original
 defendant, **ELIZABETH MONNIER**, his } Defendant.
 Widow and Executrix, by bill of revivor }

May 18, 1737

1 Atk. 611. **THE** plaintiffs, who were partners, received a bill of exchange from *Charles Newburgh*, dated the 3rd of *April*, 1731, drawn by him on *John Monnier*, in these words, "Thirty days after date, pay to Messrs. *Peter Powell* and Son, or Order, 50*l.*, value received." This bill was indorsed by the plaintiffs, and negotiated by several persons; on the 15th of *April* it came into the custody of *Lavington* and *Paul*, of *Exeter*, merchants, who sent up to *Monnier* the bill of exchange; he received it, he then kept it for ten days before the same became due, without making any objection, and, whilst he had it in his hands, wrote on the left side of the top thereof, No. 84, and at the bottom the 6th of May, which the plaintiffs charged was the private mark or number of bills by him accepted, and intended to be paid. Upon the 6th of May, the day on which the bill was payable, *Monnier* sent it back to *Lavington* and *Paul*, and refused to accept it, or allow it as so much received by him on their account; whereupon *Lavington* and *Paul* demanded

(1) This case is taken from *Atkyns*, with some additions to the statement of the case and the arguments of counsel from Lord *Hardwicke's* Note-book.

and received the 50*l.* of the plaintiffs, who can have no satisfaction against *Newburgh*, he having become a bankrupt and insolvent, before the return of the bill.

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The bill is therefore brought for 50*l.* with interest due thereon; *Monnier* died after putting in his answer, and the cause has been revived against his executrix.

It was admitted, that *Newburgh* acquainted *Monnier* by letter, of his having drawn the 50*l.* bill, and desiring him to accept and pay the same; to which *Monnier* on the 12th of April wrote a letter in answer, stating that the 50*l.* bill should be duly honoured, and placed to his debit: but *Monnier* by his answer, stated that he wrote such letter in dependence of *Newburgh's* making due remittances to answer his drafts, and that he returned the 50*l.* bill because *Newburgh* did not remit any effects to answer the same.

The *Attorney-General* insisted for the plaintiffs, that if *Monnier* had not intended to accept and pay the bill, he should, according to the custom of merchants, have returned the same immediately to *Lavington* and *Paul*, whereby the plaintiffs might have got the 50*l.* from *Newburgh*, who was then, and several days after, in good credit, and particularly in such credit with the defendant, that, after the plaintiff's bill came to his hands, *Newburgh* drew another bill of exchange on him for 18*l.* three days after date, which was duly paid. Evidence of merchants was adduced to shew that by the custom of trade, the keeping of a bill by one on whom it is drawn, without refusing to accept it, amounts to an acceptance.

The defendants proved that the marks upon this bill, were made upon all bills remitted to *John Monnier*, whether he intended to accept them or not, and that the mode of acceptance was by writing *J. M.*

Mr. Fazakerley, who was counsel for the defendant, insisted, that the suit here ought not to be proceeded upon any further, but should go off to a trial at law, as it is a mere legal question.

LORD CHANCELLOR.—If *Monnier* had been living, I should have been of opinion, that the bill ought to have been dismissed; but now he is dead, and the suit is revived against his executrix, notwithstanding it is a legal question, the plaintiffs may bring their bill, and by praying satisfaction out of assets, and a discovery of assets, it is made a case, of which this Court takes cognizance, and if they retain bills, where it is a legal demand, they must judge upon the

If this Court retain bills where it is a legal demand, they must judge upon the facts relating to such demand.

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facts relating to the legal demand, and, unless those facts are doubtful, will not dismiss the bill, and turn it over to a trial at law.

Mr. *Fazakerley* then, upon the merits alleged, that *John Monnier* kept the 50*l.* bill till the 6th of May, merely in expectation of receiving money or effects from *Newburgh* to answer it, and that, in receiving it from the indorsees, he entered it in his bill-book, as he constantly did all bills he received, whether good or bad, and that it was then entered at or against No. 84, and therefore wrote that figure at the top of it, and that it did not denote the number of bills accepted or entered to be paid by him, and that writing the 6th of May denoted the day the defendant returned the bill, that *Newburgh* not remitting any effects to answer it, he returned it to *Lavington* and *Paul*; that, at the time of drawing the bill, *Monnier* had not, nor hath since had, any effects of *Newburgh's* in his hands; and that when *Monnier* returned the bill to *Lavington* and *Paul*, he wrote as follows:—"You remitted me *Newburgh's* bill, which I do not pay for reasons, therefore please to credit me, and note 50*l.*, the same being due to-day, and let the indorsees reimburse you." And, therefore, upon all other circumstances, this is not such an acceptance as will make *Monnier* liable to pay it.

May 18, 1737. LORD CHANCELLOR.—The principal question is, whether this is a sufficient acceptance to charge the defendant, and if there was any doubt of it as to the fact, or whether in law what has been done amounts to an acceptance, it might still be necessary to send the parties to a trial at law, but I think there is no doubt of either.

If a person on whom a bill of exchange is drawn, says in a letter to the drawer, it shall be duly honoured and placed to your debit, this is an acceptance, and will make him liable, for a parol acceptance has been held to be good, and so determined in a case made for the opinion of the Court of King's Bench in the time of Lord *Hardwicke*, Ch. Justice.

Monnier, when the bill was sent to him, received it, entered it in his book, as his course of trade is proved to have been, under a particular number, and wrote that number under the bill; now it has been said to be the custom of merchants, that if a man underwrites any thing, let it be what it will, that it amounts to an acceptance; but if there was no more than this in the case, I should think it of little avail to charge the defendant, because that matter has been fully explained; but what determines me are *Monnier's* letters, by which it appears very clearly that he has accepted of it: in one he particularly mentions the 50*l.* bill, and says it shall be duly honoured, and placed to the drawer's debit; nor is there in his letters to *Newburgh*, or the indorsees, one

expression that shews the least suspicion of *Newburgh's* credit.

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MONNIER.

I think there can be no doubt, but an acceptance may be by letter, and has been so determined; there have been questions too, whether a parol acceptance could be good? Lord Chief Justice *Eyre* (2) held it was not, Lord *Raymond* held the contrary; and there was a like point before me at *nisi prius*, in the cause of *Lumley v. Palmer*, and I had a case made of it for the opinion of the Court of King's Bench, where it was several times argued, and at last solemnly determined, that such acceptance is good, much more then must an acceptance by letter be good.

As to the plaintiff's being entitled to interest, I was at first doubtful whether he could demand any; but on reading the statute of the 3rd and 4th of Ann. c. 9. s. 4., I think it a clear case that he can, though no protest for that is made necessary by the act, it being requisite only to entitle a payee to damages against a drawer, but does not mention the acceptor of a bill of exchange; and all the damages, therefore, that can be had in such a case is the interest.

The payee of a note entitled to interest against the acceptor, though no protest, for all the damage that can be had in such a case is the interest.

LORD CHANCELLOR decreed the defendant to pay to the plaintiffs the sum of 50*l.*, together with interest for the same, from the time of filing the original bill, at the rate of 4*per cent.* And further ordered, that she should also pay to the plaintiffs their costs of this suit, from the time of filing of the bill of revivor, to be taxed. (3)

(2) C. J. *Eyre* waived his opinion, and agreed with the decision of the Court of K. B. The decision in K. B. was referred to, and approved of in *Julian v. Shobrooke*, 2 Wils. 9., and in *Pillans v. Van Mierop*, 3 Bur. Rep. 1662., and was taken for granted by the Court and Bar in *Sprout v. Mathews*, 1 T. R. 182.

(3) Reg. Lib. B. 1736. fol. 332.

CHAMPION *v.* PICKAX. (1)

—
May the 28th, 1737.

1 Atk. 471.

A. devises several leasehold estates to two trustees, in trust, if his grand-daughter married without their consent, to convey the premises to two other trustees, in trust for her separate use during her life, and after her death, for the use and benefit of her issue. Though she has no children by her first husband, she has only a right for

HENRY PIERCE, by his will, devised several leasehold estates to two trustees, in trust to assign them to his grand-daughter *Mary Pigott*, at her age of twenty-one years, or marriage, if she married with the consent of them, or the survivor of them; but if she married without such consent, then they were to convey the premises to two other trustees and their heirs, in trust for the sole use and benefit of the said *Mary Pigott*, exclusive of any power and control of her husband, for and during the term of her natural life, and after her decease, for the use and benefit of her issue. She married without the consent of the trustees, and they, in pursuance of the power in the will, conveyed the premises to two other trustees, in trust for her during her natural life, and after her decease, for the use and benefit of all and every her child and children.

her life, for the issue by any husband are provided for by the settlement.

Her first husband died, and had no issue by her; she married the present plaintiff, and they brought their bill against the defendant, who was the surviving executor of the surviving trustee, to have him join in a sale of the trust estate, suggesting that the intent of the will was, for providing for the issue by the first husband only, and he dying without issue, she had now an absolute right and title to the premises.

It was decreed she had only a right for her life, for she might have issue by any husband, who are provided for by the settlement, and would take by purchase.

The bill was dismissed.

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book

EASTER TERM, 1737.

FRY *v.* WOOD. (1)

AGREED in this case where a person has been examined in Chancery, that in a cause at law between the same parties, his depositions may be used in evidence, if it can be proved that the witness is dead; (2) or by reason of sickness, (3) &c. is not able to attend, or that he is out of the kingdom, or otherwise not amenable to the process of the Court. (4)

1 Atk. 445.

Where a person has been examined here, his depositions may be read at law between the same parties.

(1) This case is taken from *Atkyns*. 283. *Kersman v. Crooke*, Trial at Bar, 2 Lord Raymond, 1166. *Jones v. Jones*, 1 Cox's Ca. 184.

(2) See *Coker v. Farewell*, 2 P. Wms. 563. Bull. N. P. 239.

(3) So *Lutterell v. Reynell*, 1 Mod.

(4) *Lord Altham v. Earl of Anglesey*, Trial at Bar, K. B. Gilb. Eq. Ca. 16. 18.

ANONYMOUS. (1)

LORD *Hardwicke* said, where there has been an order that a cause should stand over indefinitely; it does not imply that the cause is put off only to the next term.

2 Atk. 2.

An order for a cause to stand over indefinitely, does not

imply that it is only put off to the next term.

(1) This case is taken from *Atkyns*. It is not to be found in *Lord Hardwicke's Note-book*.

GEORGE MALDEN and MARY his Wife,
 THOMAS COWPER and SARAH his
 Wife, and WALTER WARBURTON
 and ANN his Wife, } Plaintiffs; (1)
 and
 LITTLETON POINTZ MEYNELL, RI-
 CHARD HARPER, Executor of SA-
 MUEL ALLEN'S Will, ANN BURDET,
 the Representative of a Surviving Trustee,
 JOHN MINORS and HENRY SCOTT,
 Executors of SAMUEL ALLEN, . . } Defendants.

June the 11th, 1737.

2 Atk. 8.

Where by marriage-settlement it is declared that trustees shall stand possessed of certain terms upon trust, that in case there shall be no issue-male of the marriage at the time of the decease of the husband or wife, which shall first happen, or in *ventre sa mere* born after his death, or in case the issue-male between them shall die without issue-male, and there shall be a failure of issue-male between them, and at the time of such failure there shall be issue-female living at the time of the husband's or wife's decease, which of them shall first happen, or born in due time after the death of the husband, that then the trustees shall by rents and profits raise the portions of such daughter, to be paid at their ages of twenty-one years, with interest for forbearance if not paid at that time, and for maintenance and education, to be paid them at the end of the first half-year after the decease of either the husband or wife; Held that there being issue-male at the death of the wife who survived her husband, that the contingency had not happened upon which the portions of the daughters were to be raised.

Where a purchaser has given a full value for an estate, a mistake made by some of the parties to a release of their claims under a marriage-settlement, shall not turn to the prejudice of a fair purchaser

(1) The statement of this case, and arguments of counsel are taken from Lord Hardwicke's Note-book; the judgment from *Atkyns*.

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“ and that there shall be a failure of issue-male of the body.
“ of the said *John Allen*, on the body of the said *Esther*
“ *Stevenson* begotten, and that there shall be at the time
“ of such failure issue-female, one or more daughter or
“ daughters between them the said *John Allen* and *Esther*
“ *Stevenson* begotten, living at the time of the said *John*
“ *Allen's* decease, or of the said *Esther*, which shall first
“ happen, or born alive in due time after the death of the
“ said *John Allen*; that then the trustees, or the survivor
“ of them, or the executors, &c. of such survivor, shall, by
“ and out of the rents and profits so to them as aforesaid
“ limited for the several terms of 600 and 590 years, raise
“ and levy, receive and pay as to and for the portions of such
“ daughter and daughters the several sums hereafter men-
“ tioned; if one daughter, the sum of 3,000*l.*, if two or more
“ 4,000*l.* equally to be divided amongst them, to be paid at
“ their several and respective ages of twenty-one years, if the
“ same can be so soon raised; but if the same cannot be so
“ soon raised, then to be paid as soon as the same can be
“ raised, with damages at 5 *per cent.* for forbearance as to
“ such parts as shall be unpaid at their respective ages of
“ twenty-one; and in the mean time raise and pay for the
“ maintenance and education of such daughter or daughters,
“ the said yearly sum or damages out of the said premises,
“ such yearly sum or sums of maintenance to be paid at
“ the end of the first half-year after the decease of either
“ *John Allen* and *Esther Stevenson*, which should first
“ happen, without such issue-male as aforesaid.”

In the settlement, there is a power of revocation of all the uses of the marriage-settlement except as to the lands in jointure, and which revocation was by a deed of 4th June 1700, executed as to the uses upon all the lands except the lands in jointure, and were by a conveyance of the 7th June 1700, sold and conveyed to *Samuel Stevenson* the father-in-law of *John Allen*. *Samuel Stevenson* by his will of the 29th October 1707, devises these estates to his daughter for her life, remainder to trustees for 500 years, upon trust to raise 450*l.* a-piece for his three grand-daughters, and subject thereto, to his grandson *Samuel Allen* in tail-male.

John Allen dies, leaving his widow and four children, his son *Samuel Allen* and three daughters.

By articles of the 24th March 1730, and made between *Samuel Allen*, his mother and three sisters, *Samuel Allen* agrees to convey the *Shewell* estate to his mother, and after reciting that he had agreed with Mr. *Meynell* for the sale of

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that part of the estate wherein his mother's jointure was, as well as the rest of the estates, and that she had agreed to join in a recovery and conveyance without prejudice to her life-estate, in consideration of 200 guineas to *Esther Allen*, 100*l.* to *Mary Allen*, 590*l.* to *Esther Allen*, and which sums were to be paid by Mr. *Meynell* on having a conveyance, but which sum of 590*l.* was to be paid by the mother to her three daughters, share and share alike, she agreed to join with *Samuel Allen* in such conveyances as were necessary to make a good title to Mr. *Meynell* : and at the end of the said articles, it is expressed, that immediately from and after the performance of the several agreements, the said *Samuel Allen*, his mother and three sisters shall execute general releases to each other in as full, ample, and general words as can be devised to prevent all possible ground of dispute between them for the future, so as not to extinguish any agreement in these articles, or the right, title, or interest of any of the parties to any lands tenements or hereditaments whatsoever, in reversion, remainder or expectancy, or otherwise howsoever, and *Esther* agrees, upon *Samuel Allen's* performance of these articles, to deliver up all deeds whatsoever, the marriage articles and her jointure deed excepted.

By articles of the 8th July 1731, and made between *Samuel Allen* and Mr. *Meynell*, *Samuel Allen* consents to convey the reversion in fee, expectant on the life-estate of his mother, and in consideration thereof, Mr. *Meynell* covenants on having a good title made to him and his heirs to pay to *Samuel Allen* 14,900*l.*, and to Mrs. *Allen* his mother, in consideration of her joining in the conveyance 982*l.* 16*s.* 4*d.* By bargain and sale dated the 22nd October 1731, intended to be inrolled, but which never was inrolled, *Samuel Allen* and his mother join in making a tenant to the præcipe, and by a conveyance of the same date, after reciting that 450*l.* given by the will of the grandfather to his three granddaughters had been raised and paid, *Samuel Allen* and his mother *Esther Allen*, in consideration of 982*l.* 16*s.* 4*d.* in hand paid to *Esther Allen*, and 13,918*l.* in hand paid to *Samuel Allen*, convey to Mr. *Meynell* and his heirs ; and *Samuel Allen* covenants against all incumbrances done by him and his ancestors, except his mother's life-estate and certain incumbrances in a schedule annexed to the conveyance, wherein the first mentioned are the said two terms of 600 and 590 years limited by the settlement of the 1st of October 1695. On 19th of February 1732, *Samuel Allen* obtained a decree against Mr. *Meynell*, specifically to per-

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form the articles, and to pay the residue of the purchase-money; whereupon *Samuel Allen*, the plaintiff, was to deliver to *Meynell* the conveyances which had been already executed. In May 1733, *Esther Allen* died, and after her death, it was discovered that the bargain and sale by *Esther* for making a tenant to the præcipe had never been inrolled, and the time having elapsed for inrolment, the recovery was considered void. Whereupon *Samuel Allen* joined with *Gisborne*, a mortgagee on the premises, in making a new tenant to the præcipe, and in a conveyance to Mr. *Meynell*. In Trinity Term 1733, a new recovery is suffered by *Samuel Allen*; and 10th July, 1733, Mr. *Meynell* had paid the sum of 13,548*l.* 6*s.* 6*d.*, in part payment of the purchase-money; in June 1734 *Samuel Allen* dies.

Upon the death of their brother, *Samuel Allen*, an estate of 1,000*l.* *per annum* comes to his sisters under their father's will.

The original bill is brought by the sisters of *Samuel Allen* and their husbands, to have their portions of 4,000*l.* raised, and for payment of the sum of 982*l.*, and the cross bill is brought by Mr. *Meynell* for establishing the purchase, and to have an assignment of the two terms of 600 and 590 years.

Mr. *Meynell*, by his answer, stated that at the time of entering into the articles of purchase, he did not know that the premises were subject to the terms for raising 4,000*l.* for the plaintiffs, nor did he contract for the same, subject to the terms for raising 4,000*l.*

The *Attorney-General*, Mr. *Wilbraham*, and Mr. *Hawkins Browne*, for the plaintiffs.

At the time of the failure of issue-male by the death of *Samuel Allen*, three daughters were living, and were living at the time of the death of the survivor of the father and mother. The defendant's construction of the trusts of the terms will make the two contingencies the same. The obscurity arises from placing the words relating to the daughters in one branch of the sentence after both the contingencies without repeating them. Supposing the daughters are entitled to have the 4,000*l.* raised, then the question arises whether they have barred themselves by the release. The 590*l.* was intended as a consideration for their contingency in case their brother had died without issue-male in the lifetime of the mother, for he could not suffer a recovery without her

MALDEN joining. And they cited *Moor v. Mayhew*, 1 Ch. Ca. 34.
v. *Bovy v. Smith*, 2 Ch. Ca. 124.

MEYNELL. Mr. Brown, Mr. Fazakerley, Mr. Weldon, and Mr. Noel, counsel for Mr. Meynell. Our cross bill is to establish our purchase, and to have an assignment of the two terms of 600 and 590 years. On their bill there are two demands, as to the first of 4,000*l.*; the daughters are parties to the articles, and are to have part of the money paid to the mother, *via.* 590*l.*, which is computed as part of the 982*l.* The estate is recited to be but 600*l. per annum*, subject to the mother's jointure, and Mr. Meynell was to give for it 14,900*l.*, and the daughters would have it also, subject to a contingent charge of 4,000*l.*, which is impossible. It was plainly intended that the family should part with their whole interest in the estate, (except the mother's jointure,) be their respective shares more or less. But it is objected that Mr. Meynell had notice of the terms, but no objection of this kind was made, till after he had paid the whole purchase-money, except about 2,000*l.* The deed of the 22nd of October, 1731 is produced by them, and in their custody: but the question is, whether the trusts for raising 4,000*l.* have ever arisen;—two contingencies upon which the portions are to arise,—1st, In case there shall be no issue-male at all at the decease of either the husband or wife, or born after the decease of the father: *v. e.* in case there never was any son at all. 2ndly, The subsequent clause relates to the issue-male of such son. The word living is not meant as a description of the daughters, but refers to the second issue-male: if there should be a son, and he should die without issue-male living at the time of the decease of the father or mother. These provisions, therefore, have never arisen, but supposing they have arisen, what relief are they entitled to in a court of equity. They claim both the 4,000*l.* and the 590*l.*, these are inconsistent; the 590*l.* is upon the foot of the purchase; the 4,000*l.* is inconsistent with it. The daughters are to release generally, so as such releases do not extend to release or discharge any of the articles or agreements hereinbefore expressed, or any of the conveyances to be executed in pursuance thereof, or any of the covenants to be contained, or any right or title of any of the parties to any lands, tenements, or hereditaments in possession, reversion, remainder, or expectancy; this relates to an estate of 1,000*l. per annum*, which they were to have on their

brother's death. These trust terms were only a security, not considered as real estate. But it is objected, that here was an ignorance of their right. The answer is, that they knew the deeds, and the terms, and they must take notice of their rights. Suppose both parties are under a mistake, to whose prejudice ought it to turn. At the time they pretended to make the discovery, we had not more than 2,000*l.* in our hands. And they cited *King v. Withers, coram Lord Talbot*.

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Mr. *Attorney-General* in reply. The construction we make, is according to the common provision made in marriage-settlements. The latter end of the clause as to the half-yearly payment of the interest, is to answer the purpose of both contingencies; if upon the execution of the articles the 4,000*l.* had been in contemplation, there ought to have been an express covenant from the daughters to renounce the benefit of this provision, and as there is no such covenant, he submitted it to the Court, that the plaintiffs are still entitled to the 4,000*l.* The whole 982*l.* was to be a consideration only for what the mother agreed to do.

LORD CHANCELLOR.—This settlement is very inaccurately June 14, 1737.
penned; it has been insisted that the meaning of it is, that if there should be a failure of issue-male, in the lifetime of *John Allen*, and *Esther* his wife, then the 4,000*l.* should not be raised, and therefore, as there was issue-male in the lifetime of *John* and *Esther*, the contingency has never happened.

But this is an absurd construction, to confine it to issue-male in the lifetime of *John* and *Esther*, because it is expressly extended to issue-male born in due time after the death of *John*, therefore this can never be the meaning of the words.

I do not think that the release under the articles is material on one side or the other, and therefore it may be thrown out of the case.

There are three considerations.

First, Whether the contingency has taken place upon which the trust of these terms was to arise, or not? And if it is still to be regarded as a beneficial interest, or whether they are attendant upon the inheritance?

Secondly, Whether the plaintiffs have barred themselves of their right to the 4,000*l.*?

Thirdly, Whether the defendant, Mr. *Meynell*, is entitled to have an assignment of these terms?

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As to the first question ; upon taking all the circumstances of this case together, I am of opinion the contingency has not happened :—

“That in case there should be no issue-male of the said *John Allen*, on the body of the said *Esther Stevenson* begotten, at the time of the decease of the said *John Allen*, or of the said *Esther Stevenson*, which shall first happen, or in *ventre sa mere*,” &c.—*vide* the settlement.

“Or in case the issue-male between them, shall all of them die without issue-male, and that there shall be a failure of issue-male of the body, &c. and that there be, at the time of such failure, issue-female, one, or more daughters between them the said *John* and *Esther* begotten, living at the time of the said *John Allen*’s decease, or of the said *Esther*, &c., then the trustees, &c. shall raise and pay, if one daughter 3,000*l.*, if two or more 4,000*l.* equally to be divided,” &c.

The ambiguity of this clause arises from the word living.

The counsel for the plaintiffs have construed living to refer to daughters living at the time of the failure of issue-male, and that the meaning of the words living at the time, &c. are to be taken as a further description in regard to the failure of issue-male.

The counsel for the defendants have construed the word living to refer to the issue-male living at the time of the said *John Allen*’s decease, or of the said *Esther*, which shall first happen.

The clause relating to the payment explains it still further, and shews the parents could not mean to extend the payment of these portions to a son’s dying without issue-male at any time whatsoever, for the brother might have lived to fourscore years, which is too remote for them to have in their contemplation, and therefore they have fixed the payment at twenty-one.

The interest also was to commence upon the dying of *John Allen*, &c.

This refers to either dying without issue-male, and in this case both died leaving issue-male.

The meaning then is plain, that this was intended as a provision for daughters, if there should be only daughters at the time of the death of *John Allen*, or of the said *Esther*.

The common and ordinary provision in marriage-settlements is, that if the sons die before twenty-one, then the

trustees, &c. shall by sale, &c. levy and raise, &c. and not that it should be stretched to a dying at any time.

The second question is, whether the plaintiffs have barred themselves of their right.

To my apprehension, it was intended by the mother, daughters, and sons, that all the estates in the family should be parted with upon the consideration expressed in the articles.

It appears plainly too, that the son was to convey this estate to Mr. *Meynell*, clear of every thing but the estate for life, which the mother had by virtue of her jointure, without any reservation besides for any other part of the family.

Great part of the estate of *John Allen* was settled on the mother, with remainder to the son in tail, remainder to him in fee, and therefore the son by fine could have barred the remainder on all the estates, except the estate left by the grandfather.

The proviso was not intended to save any right the daughters might have upon any lands, and after having a sum of money in consideration of these articles, it would be too much for them to contend that they have a right to set up this demand.

It seems to me, that Mr. *Meynell* has given very amply for this estate, and shall a mistake of the parties, who knew nothing of the 4,000*l.* at the time, turn to the prejudice of a fair purchaser.

It is rightly observed, that the bill is inconsistent; for would they have the consideration of these articles and the 4,000*l.* too, when their releasing all demands was the only pretence for the sum of 982*l.* the consideration money in the articles.

It is said, that the whole articles must be performed; but *Samuel Allen* has not performed his part, for he has not conveyed the *Shewell* estate, and therefore the articles are void. But still the defendant Mr. *Meynell*, is intitled to his equity, for the heirs of *Samuel* ought to perform it.

And if the plaintiffs insist upon the 982*l.* they must convey to Mr. *Meynell*, or else they are not entitled to it; which they agreeing to accept, Lord *Hardwicke* dismissed the bill as to the trusts of the term set up by the plaintiffs, and they were decreed to convey by an assignment of the terms to Mr. *Meynell* upon payment of 590*l.* part of the 982*l.* which sum was directed to be paid in thirds to the plaintiffs from the time of the conveyances executed, the

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MALDEN residue of the 982*l.* was directed to be paid to the executors
v. of the mother, the plaintiffs *Malden* and his wife. (3) (4)
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(3) Reg. Lib. B. 1736. fol. 477.

(4) In the *Lord Chancellor's* Notebook the following decree appears: 1st. Account of what is due for 982*l.* and interest at 4*l. per cent.* from 25th December, 1731, on possession. 2nd. That 590*l.* part of the principal together with the interest for that sum be paid by defendant Mr. *Meynell* in manner following (that is to say) one-third to plaintiff *Malden* and his wife, one third to plaintiff *Warburton* and his wife, and one third to plaintiff

Esther Cooper—it being admitted that her husband is dead. 3d. Residue of 982*l.* and interest to be paid to the executors of *Esther Allen*. 4th. On the cross bill upon such payment made, and payment of the residue to the executors of *Samuel Allen*, defendant *Ann Burdet*, representative of surviving trustee, assign the two terms to such person or persons as defendant *Meynell* shall appoint to attend the inheritance, at his expense. Master to settle it. No costs on either side.

MARY METCALF, Widow, Plaintiff ;
 and

IVES and his Wife, and JOHNSON and }
 his Wife, } Defendants.

AND

IVES and his Wife Plaintiffs ;
 and

MARY METCALF, and JOHNSON and }
 his Wife } Defendants. (1)

June 18th, 1737.

1 Atk. 63.

By articles before marriage husband and wife agree in consideration of 2,000*l.* the wife's portion to release all right which they might be entitled to in respect of her father's personal estate by the custom of London ; this agreement though never carried into execution by the husband and entered into when his wife was an infant shall bind and prevent her claiming any further part of her father's personal estate ; and the wife's right to the orphanage part shall go to increase the whole general estate of the father ; and the rather as the release is, to be made to the executors who represent the whole estate ; (2) and an award between some of the parties in respect of the father's personal estate was set aside on the ground that the marriage articles had been concealed from one of the arbitrators.

(1) This case is taken from a manuscript found amongst the papers belonging to Lord Chancellor *Hardwicke*.

(2) See *Pusey v. Desbouverie*, 3 P. Wms. 315. *Read v. Snell*, 2 Atk. 644. The cases cited in *Tomkyns v. Ladbrooke*, 2 Ves. 592. The present case and the other cases appear to have been decided with reference to the particular customs of the city of London.

In *Pitt v. Jackson*, 2 Bro. Ch. Ca. 51. by marriage-settlement 1,500*l.* was vested

in trustees, and 5,000*l.* covenanted to be paid to them by the husband to be laid out in land to be settled to the husband and wife for their lives, with remainder to the children of the marriage as the father should appoint, and in default of such appointment, as the mother should appoint, and in default of her appointment to the children in tail ; the father by his will stating that the money had not been laid out in land, gave to *Ann* more than half of the money, and

and her husband and the issue of the marriage, which was all the advancement she had from her father during her life, and upon the marriage of his two other daughters, Mrs. *Ives* and Mrs. *Johnson* he gave them each 2,000*l.* Previous to the marriage of Mr. and Mrs. *Johnson*, an agreement, dated 4th of February 1703, was entered into by which in consideration of 2,000*l.*, the marriage portion of Mrs. *Johnson*, *Richard Johnson* and *Sarah* declared and agreed that the said sum of 2,000*l.* was to be the marriage portion of *Sarah*, and should be in full satisfaction, lieu, and bar of all such part and share of the personal estate of *William Russell* which *Sarah* or her husband or he in her right might claim or be entitled unto by common law or by virtue of any custom of the city of *London*, and they both covenanted not to prosecute any suit or action for any part or share which *Sarah* might be entitled unto out of her father's personal estate, and to execute releases to the executors or administrators of the father. At the time of executing this agreement and of the marriage Mrs. *Johnson* was an infant, *Russell* by the sale of his real increased his personal estate to near 30,000*l.* and died leaving Mrs. *Met-*

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the residue to *Mary*; but afterwards having advanced to *Ann* upon her marriage more than she could have been entitled to under the settlement, he by a codicil revoked what he had given to *Ann* by his will. It was held that the father became a purchaser of *Ann's* share under the settlement by the fortune given to her on her marriage; and see *Smith v. Lord Camelford*, 2 Ves. jun. 698.

But in *Folkes v. Western*, 9 Ves. 456. where under marriage articles certain sums were agreed to be settled upon younger children as the father and mother or the survivor should appoint, and in default of appointment equally amongst their children, and the father having two younger children advances upon the marriage of one child a sum of money in satisfaction of her portion: It was held, that the effect of the advancement was not to make the father a purchaser of that child's portion, but that her portion went to the other child who had not received any advancement. It is to be observed, that in this case

Pitt v. Jackson was not brought under the consideration of the court, and that it was decided in analogy to the particular customs of *York* and *London*. In speaking of this case, the Vice-Chancellor (Sir J. *Leach*) says, "that having carefully considered the case of *Folkes v. Western*, I do not concur in the observation made at the bar, that there is error in that decree, inasmuch as it was not declared that the father was a purchaser of Mrs. *Lloyd's* share; there was in that case no expressed intention on the part of the father to that effect." *Noel v. Lord Walsingham*, 2 Simon's & Stuart's Reports, page 111. But in *Dawson v. Duke of Cleveland*, post 106, where the father having appointed under letters patent 8,000*l.* to one daughter for her marriage portion and the residue amongst his other younger children, and afterwards gives to that daughter a marriage portion of 20,000*l.*, Lord *Hardwicke* held that the 8,000*l.* accrued to the personal estate of the father.

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calf, Mrs. *Ives*, and Mrs. *Johnson* his only children, having first made his will, whereby he left Mrs. *Metcalf* 2,000*l.* and an annuity of 40*l.* *per annum* to Mrs. *Johnson* for life, and after some other legacies made *Ives* and his wife residuary legatees.

Mrs. *Metcalf* being willing to waive her legacy and take to her orphanage share, some differences arose thereon between her and *Ives* and his wife, which were referred to arbitration. The arbitrators by their award dated in April, 1727, taking notice that *Ives* had made oath that the testator's estate amounted to 26,000*l.* whereout he owed 1,200*l.* and considering Mrs. *Ives* as not advanced at all, and Mrs. *Johnson* as advanced only by the 2,000*l.* given to her upon her marriage, and consequently entitled to a further orphanage share of the estate, awarded Mrs. *Metcalf* the sum of 4,450*l.* in full of her orphanage share, and mutual releases to be given, which was accordingly done. In 1726, *Johnson* and his wife filed a bill in the Exchequer against *Ives* and his wife in respect of the orphanage part of *Russell's* estate, which terminated in an agreement between *Johnson* and *Ives* by which *Johnson* agreed to take 2,143*l.* in full of all demands on the estate of *Russell*. The marriage articles between *Johnson* and his wife were not produced before the arbitrators; one of them indeed stated that he had seen them, but the other swore that he had not, and that if he had known their contents he would not have consented to the award. Mrs. *Metcalf* now brought her bill to be relieved and to set aside the award, and releases, and to be let into her full orphanage share, regard being had to *Ives's* advancement and to *Johnson's* being barred from any share by her marriage articles; a cross-bill was exhibited by *Ives* and his wife against Mrs. *Metcalf* and against *Johnson* and his wife, praying relief against the award, for that no allowance was made thereby of the 1,000*l.* which Mrs. *Metcalf* had received upon her marriage, and which was concealed by her from the arbitrators, and that she might be decreed to give up her securities for the 4,450*l.* awarded to her, and account for the interest received; and praying against *Johnson* that he might be decreed to return the money he received for the purchase of his claim, he being barred by the articles.

Both causes were heard at the Rolls and both bills dismissed.

The questions now were, whether these articles were a

bar being but a bare agreement not carried into execution, and if so whether the benefit arising from the composition with *Johnson* should accrue to the estate of the freeman, or only to his legatary share; and lastly whether the court would relieve against the award.

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Mr. *Attorney-General (Ryder)*, Mr. *Chute*, and Mr. *Stracey*, for the plaintiff *Metcalf*, insisted that the marriage articles of Mr. and Mrs. *Johnson* were binding as to her interest in the customary share; that there could be no doubt that a child of full age might agree to do such an act for a valuable consideration, and that if so then a husband who marries a woman under age might covenant to do it, and to release the customary share; and to this point they cited *Hobson v. Trevor*, 2 P. Wms. 191. *Beckley v. Newland*, 2 P. Wms. 182. *Taylor v. Taylor*, in Scacc. *Lockyer v. Savage*, in Scacc. 2 Stra. 947. *Kemp v. Kelsey*, Prec. in Chan. 544, 594., and it was also argued that *Ives* and his wife could not insist that the award should not be set aside since it was the prayer of their own bill that it should; and further that having purchased of *Johnson* at an under-rate they ought to be accountable.

Mr. *Fazakerley*, for *Ives* and his wife, contended that Mrs. *Metcalf* was bound by the award; that she acquiesced in it till 1732, and received the money awarded. That the award was right in itself; but supposing in strictness there was a mistake, mistakes in judgment afford no ground to set aside an award, the parties have had an opportunity of being heard; and it is not pretended that they were ignorant of the fact of the articles: if they were aware of them it was their business to have laid them before the arbitrators, indeed one of these at least, swears that he had heard of them. In these cases the court will not examine whether they judged rightly or not, unless there be fraud. That it was true that Mr. *Ives's* bill sought to set aside the award upon certain terms, but yet by his answer he insisted upon the award as against Mr. *Metcalf* that one thing made this an unconscionable demand. The will of the father has given 2,000*l.* to Mrs. *Metcalf*, and 3,000*l.* to her children, which must come out of the deadman's part.

Mr. *Browne*, for *Johnson* and his wife, contended that the agreement on the marriage of *Johnson* did not bind the wife who was then an infant, and could have no more force than if she had not been a party. That there is no lien on the orphanage part, it being only a possibility, and that the

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husband had no interest at the time of making the articles which was before marriage. In *Lockyer v. Savage* the wife was of full age and could bind herself. In the case of *Kemp* there was a marriage without the father's consent, and that forfeits the orphanage part; this is not a case within the custom, for by that it must be—1st. either a bar by advancement which this cannot be said to be, or 2nd, a composition, this is not so because Mrs. *Johnson* was an infant and incapable of contracting. This then is only the case of a personal agreement between the husband and the father; if the wife should survive, this right would survive to her; it is only a personal obligation on the husband, and cannot bind the wife.

June 18, 1737. LORD CHANCELLOR :—I cannot enter into any of the hardships which may fall upon any of the parties, but must decree according to the merits of the case. The first question is whether these articles being but a bare agreement not carried into execution shall bar the defendants *Johnson* and his wife, from claiming any further share of her father's personal estate. And as to that I am of opinion that the articles are a bar, they being entered into as a consideration for the marriage and portion, long before the defendant, *Johnson*, was entitled to any thing from her father, and no hardship is thereby imposed by him either upon the husband or wife; and there is no difference in a court of equity whether it be but a bare agreement or whether it be actually executed; but both must operate as well against customary as other rights, there being no difference between common law, and customary rights, nor between vested and contingent ones. As appears from the case of dower which is both a common law and a contingent right, and yet of which a woman may bar herself; so that contingent and vested rights stand as to the present purpose upon the same footing, it being in a person's power to bar him or herself of both. (1) It has been objected that the wife was an infant at the time of these articles; but the husband was of full age and hath thereby contracted to accept of this sum as a full bar, and to give a release to the father's executors; and this same husband being living at the father's death must execute this agreement; besides this was such an interest as he might have released, and his release would

(1) See *Blunden v. Barker*, 1 P. Wms. 639. *Cox v. Belitha*, 2 P. Wms. 273. *Lockyer v. Savage*, 2 Strange 947.

have been good against the wife. It is plain that had she been of age these articles would have bound her; but in the present case though she was not of age, it is not herself but her husband that is before the court, and he can take no advantage of his wife's infancy; and if agreements of this kind were not held good and binding it might occasion great prejudice to the citizens of *London*, who may desire to marry their children in their own lifetime, and to settle the rate of each child's portion. The next question is, whether the plaintiff can claim the benefit of this agreement; in other words, whether the surplus arising from this composition shall go to the freeman's whole estate, or whether only to his legatary share; and this I think must come within the constant rule, that in cases of composition what accrues thereby goes to and is considered as part of the freeman's estate, and as if the person compounded with had been entirely out of the question. Agreements to do a thing whether relating to customary or common law rights are considered in equity as if the thing was actually done; so this agreement being to release to the executors of the father must be so construed as to have the same effect as if the release had actually been made, which would have operated as an extinguishment of the wife's right to the orphanage part, and the benefit would have accrued to the whole estate, the executors being the freeman's representatives as to the whole estate, and therefore the release must be according to the agreement.

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The last point is, whether there ought to be any relief against the award; and I think the plaintiff well entitled to relief upon account of the concealment of the articles from one (at least) of the arbitrators, who deposes that had he known of them, he would not have made such an award.

Now though awards are not to be set aside for an error in law. (1) If any act or industry be used by either of the parties to prevent the arbitrators coming at the knowledge of a fact, the Court will relieve against an award. (2)

Awards are
not to be set
aside

(1) Awards cannot be set aside upon errors in law if the parties refer a question of law to an arbitrator meaning to have his decision upon the law, *Knox v. Symonds*, 1 Ves. jun. 369. *Ching v. Ching*, 6 Ves. 282. *Young v. Walter*, 9 Ves. 364. But if they refer to a person to decide all matters in difference according to law, and he means

to decide according to law, and mistakes, the Court will set that right, *Kent v. Elstob*, 3 East 13. *Young v. Walter*, 9 Ves. 364.

(2) Awards may be impeached for misbehaviour, corruption, excess of power, and mistake of arbitrators, *Burton v. Knight*, 2 Vern. 514. *Chicot v. Lequesne*, 2 Ves. 315. *Mor-*

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judgment in point of law, yet if any act or industry be used by either of the parties to prevent the arbitrators coming at the knowledge of the fact, it will be a good ground to relieve against and set aside such an award; as was done by Lord *Cowper*, who set aside an award for the arbitrators having proceeded upon a mistake. Upon these grounds the decree at the Rolls was reversed; and the articles were decreed to be a bar; and the award to be set aside. (1)

gan v. Mather, 2 Ves. jun. 15. *Walker v. Frobisher*, 6 Ves. 70. But and distinct, *Anderson v. Darcy*, 18 Ves. 448.
the evidence of mistake must be clear (1) Reg. Lib. B. 1736. fo. 447.

JAMES BUSH and Another, Executors of } Plaintiffs; (1)
JOHN WOODWARD }
and
ELIZABETH WOODWARD and Others,} Defendants.
Executors of FRANCIS WOODWARD }

June 24th, 1737.

Where a settlement was prepared whereby the father agreed to settle upon his son who was unprovided for, and his wife and the issue of the marriage certain lands; but previous to its execution refused to execute it unless the son gave him a bond, to which the son having objected at last consented and privately executed the bond; The court relieved against the bond. (2)

(1) This case is taken from Lord *Hardwicke's* Note-book.

(2) So *Arundel v. Trevilian*, 1 Ch. Rep. 87. *Drury v. Hooke*, 1 Vern. 412. *Smith v. Bruning*, 2 Vern. 392. *Stribblehill v. Brett*, 2 Vern. 446. *Smith v. Aykwell*, 3 Atk. 566. *Cole v. Gibson*, 1 Ves. 503. And in *Shirley v. Master*, 1779, the court of Exchequer was of opinion that such contracts being avoided on reasons of public inconvenience, will not admit of subsequent confirmation; but a court of equity will not set aside a marriage brocage bond; which when done would be injurious to a former agreement made upon a valuable consi-

deration, *Roberts v. Roberts*, 3 P. Wms. 74. So underhand agreements made to defeat marriage agreements are set aside as fraudulent, *Redman v. Redman*, 1 Vern. 348. *Gale v. Lindo*, 1 Vern. 475. *Lumlee v. Hanman*, 2 Vern. 499. *Keat v. Allen*, 2 Vern. 588. *Webber v. Farmer*, 2 Bro. P. C. 88. Relief seems to have been given in the preceding cases upon the ground of vice in the original contract; but in *Neville v. Wilkinson*, 1 Brown Ch. Ca. 53, where the original contract was good, yet where the defendant upon a treaty of marriage represented that a debt did not exist, Lord *Thurlow* relieved against it, and said

Woodward from his son *John Woodward*, in fraud and prejudice of the marriage agreement of the latter.

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In 1728 *John Woodward*, being about to be married to a lady whose portion was 3,000*l.*, a settlement was prepared whereby the father agreed to settle certain lands upon his son and his intended wife and the issue of the marriage. Previous to the execution of it, *John Woodward* was for the first time informed that his father, *Francis Woodward*, would not execute it unless he gave him a bond for 500*l.* To this *John Woodward* strongly objected; but at last consented, and the bond in question was accordingly privately executed by him, by which he bound himself in a penalty of 1,000*l.* to pay 500*l.* within one month after his father's death.

Mr. Browne for the defendants.—*John Woodward* was a younger son wholly unprovided for, there being no provision secured to him in his father's settlement. The person who informed him of the necessity of executing the bond was the solicitor employed by the wife's family.

The *Lord Chancellor* decreed that the plaintiff should be relieved against the 500*l.* bond; and that the same should be delivered up to be cancelled; and that a perpetual injunction should be awarded to stay proceedings on the said bond. (3)

he would not lay it down as a rule that fraud, in cases of this nature, must be upon an article expressly contracted for; if any man upon a treaty for any contract will make a false representation, by means of which he puts the person bargaining under a mistake upon the terms of the bargain, it is a fraud—it misleads the parties contracting on the subject of the contract. See likewise *Scott v. Scott*, 1 Cox's cases, p. 367., where *Eyre, C. B.*, says, that in *Neville v. Wilkinson*, the concealment of the debt directly affect-

ed the trusts of the marriage agreement; but *quære* whether the court would relieve against the wilful concealment of a debt originally good, but which did not impugn some part of the marriage agreement, or infringe some interest derived under it, *ib.* A bond given as a remuneration for assistance in effecting an elopement and marriage, though given by the husband subsequent to the marriage, is void, *Williamson v. Gihon*, 2 Sch. & Lef. 364.

(3) Reg. Lib. A. 1736. fo. 596.

NANCY SMITH Plaintiff;
and
JAMES DOWNING Defendant. (1)

June 25th, 1737.

(2) Particular acts of excessive drinking by a party executing a conveyance not a sufficient ground to set aside a conveyance; nor inadequacy of price alone (3), where there is no fraud, especially where the person claiming against the conveyance has allowed fifteen years to elapse without taking any step.

THIS case came on by Appeal from a Decree of the Master of the Rolls.

The plaintiff claimed the property in question as heir at law to her mother.

(1) This case is taken from Lord *Hardwicke's* Note-book.

(2) Intoxication alone is not a sufficient ground for setting aside a deed or agreement, *Cory v. Cory*, 1 Ves. 19. *Cooke v. Clayworth*, 18 Ves. 15. *Secus* if through the management or contrivance of him who gained the deed, the party from whom such deed has been gained, was drawn in to drink; *Johnson v. Medlicott*, by Sir *J. Jekyll*, May 29, 1734, 3 P. Wms. 130.; or where there is that extreme intoxication which deprives a man of his reason, *dictum* by Sir *William Grant*, in *Cooke v. Clayworth*, 18 Ves. 12.

(3) Mere inadequacy of price is not a ground for setting aside an agreement, see *Mortimer v. Capper*, 1 Brown's Rep. 157. *Griffith v. Spratley*, 1 Chan. Rep. 382. *Moth v. Attwood*, 5 Ves. 845. *Low v. Barchard*, 8 Ves. 133. *Burrows v. Lock*, 10 Ves. 474., unless the inaccuracy is so gross as to shock the conscience of any man who heard the terms, *Heathcote v. Paignon*, 2 Bro. Ch. Ca. 167, and *Gibson v. Jeyes*, 6 Ves. 272; or where it is so gross, as to be conclusive evidence of fraud, *Coles v. Tre-*

cothick, 9 Ves. 246. *Lowther v. Lowther*, 13 Ves. 103.; or where it is such as to satisfy the conscience of the court by the amount of the inadequacy that there must have been imposition or that species of pressure upon distress which in the view of the court amounts to oppression, *dict. per Lord Eldon*, *Underhill v. Horwood*, 10 Ves. 209. What is to constitute that inadequacy from which fraud, imposition, or oppression is to be inferred has never been defined. In *Heathcote v. Paignon*, 2 Brown's Rep. 166., an annuity purchased on a life of 30 for four years purchase, was considered to afford evidence of fraud. But this decision has been disapproved of by Lord *Eldon*, Lord *Redesdale*, and by Lord *Thurlow* himself, and is not considered as an authority. See the note to *Verner v. Winstanley*, 2 Sch. & Lef. Rep. 395. *Gibson v. Jeyes*, 6 Ves. 274. *Low v. Barchard*, 8 Ves. 137. In *Mortimer v. Capper*, 1 Brown's Rep. 156., Lord *Thurlow* mentions a case where the consideration was only one tenth of the value, and yet a specific performance was decreed.

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DOWNING.

The defendant by way of defence insisted :—

1st. That the plaintiff was illegitimate.

2ndly. That the premises were conveyed to the defendant by way of mortgage in 1713, and that in 1714, the equity of redemption was absolutely released to him subject to an annuity of 10*l. per annum* to the plaintiff.

The supposed marriage between the plaintiff's father and mother was said to have taken place in 1697.

By deed of 20th March, 1703, the premises in question were vested in trustees, in trust for the separate use of *Mary Pearson* the plaintiff's mother for her life remainder to such uses as she should by deed or will appoint.

Mary Pearson, upon the death of *Henry Pearson* married *Lewis Rice*, and by deed of 13 January, 1713, mortgaged the premises to the defendant for 1000 years to secure 300*l.* which he had lent to her, and the receipt of which was thereby acknowledged.

Mary Pearson, otherwise *Rice*, by will of 20 March, 1713, gives the premises to the defendant and his heirs, and declares her will to be that he should pay to the plaintiff by the appellation of "her god-daughter" 10*l. per annum*, during her life, and directs her trustees to convey the premises to the defendant and his heirs.

By deed of 14th August, 1714, *Mary Pearson* otherwise *Rice*, after reciting that the mortgage term was forfeited to the defendant, and that a further sum of 300*l.* had been advanced, the receipt of which was thereby acknowledged, she and her trustees grant and confirm the premises to new trustees for 100 years, remainder to the defendant and his heirs. The trust of the term of 100 years, was declared to be to secure 60*l. per annum* to *Mary Pearson* for her life, and the residue to the defendant, and after her death to secure the annuity of 10*l. per annum* to the plaintiff.

Mary Pearson died on the 28th of November, 1714.

By deed of 20 January, 1714, reciting *Mary Pearson's* will, her trustees in pursuance of the trusts thereof convey the premises in trust for the defendant, subject to the annuity of 10*l. per annum*.

On behalf of the plaintiff, evidence of her legitimacy was adduced, but it appeared upon examination in the parish where the marriage between her father and mother was stated to have taken place, that the register for that year was not to be found. In order to invalidate the conveyances under which the defendant held, evidence was ad-

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vanced to shew that the estate at the time *Mary Pearson* came into possession of it was worth 200*l. per annum*, and that she by immoderate drinking had so much impaired and weakened her understanding, as to become incapable of managing her affairs, and that about six weeks before her death, she went and lived with the defendant.

Mr. *Fazakerley* and Mr. *Yate*, for the plaintiff, contended that the plaintiff's legitimacy was established by the evidence, and that the conveyances to the defendant were void for fraud and imposition. That by the deed of January, 1714, he took a conveyance from the trustees in pursuance of the will, without relying upon his title as a purchaser.

Mr. *Attorney-General* and Mr. *Browne*, for the defendant, contended that the plaintiff's legitimacy was not established. That the defendant's title was secured by a fine levied in Trinity Term, 1714, by *Mary Pearson*, of which the deed of 14 August, 1714, was a declaration of uses. That where a feme covert levies a fine without her husband, no one but her husband can ever avoid it. That there is no proof of *Mary Pearson's* incompetency, or of any fraud. That a valuable consideration was given for the conveyances, which is acknowledged by the deeds themselves. That *Mary Pearson* did not come to live with the defendant until after the deeds were executed, and that the plaintiff had continued to receive her annuity until the year 1733, when the bill was filed.

June 24, 1737. LORD CHANCELLOR.—There are two questions in this case; 1st, Whether the plaintiff has made out her legal title as heir at law; and, 2dly, If she has, whether there are equitable grounds to set aside the conveyances under which the defendant claims.

The first question depends upon the plaintiff's legitimacy; but it is unnecessary to examine the evidence upon that point, because the legal title has been shewn to be in the defendant, and I do not find any grounds of equity to set aside those conveyances, and to take that legal title from him.

It is said that these conveyances were fraudulently obtained, but there is no proof of actual fraud or imposition. It is, however, contended that sufficient grounds for relief exist in the circumstances arising out of the condition of the parties, and of the deeds executed between them; and, first, the evidence of *Mary Pearson* having been addicted to drinking is relied upon, but particular acts of excessive

drinking are not sufficient; and if the excess was so great as to produce actual imbecility, the case is open at law.

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2dly, It is said that *Mary Pearson* was actually in the power of the defendant, and that this is to be inferred from her residing in his house; but by the plaintiff's own evidence, she did not go to reside with the defendant until after all the conveyances were executed. The defendant's answer says, that it was about August, which might indeed be before the conveyance of the 12th of August, but must have been subsequent to the mortgage, and the will, the first of which is dated on the 12th of January, 1713, and the latter on the 20th of March, 1713, at which times it is not pretended that she resided with the defendant, and the will shews her intention, that he should have the estate. The last point insisted upon is, that the consideration is inadequate. That alone would not be a sufficient reason for me to decree in favour of the heir at law where no fraud appears: but consider what the consideration is; the property consists of houses, the consideration was 600*l.* in money, 60*l.* *per annum*, reserved to herself for life, and 10*l.* *per annum* to the plaintiff; besides which it is clear that she intended some advantage to the defendant.

Added to these considerations, is the great length of time which the plaintiff has permitted to elapse. The bill was not filed until fifteen years after the plaintiff came of age, during the whole of which time she accepted her annuity of 10*l.* *per annum*, although she must have known in what right she received it. I am therefore of opinion, that the decree must be affirmed. (1)

(1) Reg. Lib. B. 1736. fol. 403.

JOHN SIMANCE, and ELIZABETH his	} Plaintiffs ;
Wife	
and	
JAMES TATAM, ROBERT HITCH-	} Defendants.(1)
COCK, and RICHARD WEBB . . .	

June 28th, 1737.

1 Atk. 613.

Where by a marriage-settlement the husband conveys his estate to trustees to the use of himself for ninety-nine years, if he should so long live, with remainder to trustees to preserve contingent remainders, remainder to the wife for life, remainder to the heirs of her body by the husband, with a covenant on the part of the husband not to bar or destroy the estates intended to be settled, this Court will not compel the trustees to destroy the contingent remainders by joining in a sale.

THE bill as against *James Tatam*, was for a specific performance of an agreement for the purchase of an estate, and as against *Hitchcock* and *Webb*, that they might be decreed to join in the conveyance.

By an indenture of purchase of June 3, 1729, between *John Simance* of the first part, *Elizabeth Hitchcock* of the second part, *Robert Hitchcock* and *Richard Webb* of the third part, being the settlement previous to and in consideration of the marriage between the plaintiffs, the estate in question was conveyed to *Hitchcock* and *Webb*, and their heirs, to the uses after the marriage of *John Simance* and his assigns, for ninety-nine years, if he should so long live, and from and after the determination of that estate, to *Hitchcock* and *Webb*, and their heirs, in trust to preserve the remainder to the wife for her life by way of jointure, remainder to the heirs of the body of the wife begotten by the husband, remainder to the right heirs of the husband. This indenture of settlement also contained a covenant on the part of the husband, not to bar or destroy the estates intended to be settled.

Mr. *Attorney-General* for the plaintiffs, cited the following cases, *Tipping v. Pigot*, Mich. 1713. *Elie v. Osborne*, 2 Vern. 754. *Trewen v. Charlton*, and contended that if the trustees should join in the conveyance, a court of equity would not compel them afterwards to make satisfaction ; and that

(1) The statement of the case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*.

courts of equity consider the tenancy in tail as including the whole interest in the estate, and that no remainder over is of any value.

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Mr. *Pitworth* for the defendant *Tatam*, argued that this settlement ought to be considered as articles in respect of the covenant by the husband not to bar or destroy the estates intended to be settled.

LORD CHANCELLOR.—There are many cases in which the Court will compel the trustees to join in such a conveyance as will destroy contingent remainders, but then it must be in some measure to answer the uses originally intended by the settlement; and has been usually done in the case of old settlements only, as in *Winnington v. Foley*; (1) but I believe no instance, where they have compelled such trustees to join with the father termor for ninety-nine years, and the son to sell the estate. June 28, 1737.

The old notion was, that these trustees were only honorary; but this has been waived since, for in the case of "*Pigot v. Pigot*, Lord *Harcourt* was of a different opinion, and in *Mansell v. Mansell*, 2 P.Wms. 678., Lord Chancellor *King*, assisted by Lord Chief Justice *Raymond*, and Lord Chief Baron *Reynolds*, was of opinion, that trustees for supporting contingent remainders, joining to destroy them, were guilty of a breach of trust, and that there was no diversity, whether the settlement be voluntary, or for a valuable consideration, or by will only." But the reason of those cases turned upon what the Court should do, after trustees had actually destroyed the remainders; here the case is different, for the application to the Court is to compel the trustees to do an act which would destroy the remainders.

There is another difficulty besides, which is, the husband's actually covenanting in the settlement, that he will not bar the estate tail to the wife, but preserve the uses before limited; and even though the husband were dead, the wife could not do any act by which she could bar the estate tail, notwithstanding the trustees should consent to join with

(1) 1 P.Wms. 536. There, in a marriage-settlement, the husband was made tenant for ninety-nine years, if he so long lived, remainder to trustees during the life of the husband to preserve contingent remainders, &c., remainder to the first, &c. sons of that marriage in tail male successively; a son was born,

and of age, the wife dead; the son being in treaty for a marriage, which appeared to be a beneficial one for the family, Lord Chancellor *Parker* decreed the trustees should join with the father and son in barring this, and making a new settlement.

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her, for she is absolutely restrained from barring it by the 11 Hen. 7. c. 20. (2)

If it had been an application only to destroy the contingent remainders, I should have taken more time to consider; but here it would overturn all the uses of a marriage settlement, which would be assuming too much power, and would be making a decree to compel a breach of the husband's own covenant.

The bill was dismissed.

(2) "If any woman which shall hereafter have any estate in dower, or for term of life or in tail, jointly with her husband, or only in herself, or to her use, in any manors, lands, &c. of the inheritance, &c. of her husband, and shall hereafter being

"sole, or with any other after-taken husband, discontinue, alien, &c. or suffer a recovery of the same, such recovery, discontinuance, alienation, &c. shall be utterly void and of no effect."

MICHAEL ROBINSON and THOMAS HUNTER, Executors of Doctor JOHN MORLEY } Plaintiffs;

and

JONATHAN BACON and ELIZABETH his Wife, RICHARD TAYLOR and MARY his Wife, AARON COOPER and JANE his Wife, and Others . . } Defendants.(1)

Between June 28th, and July 6th, 1737.

Where a testator by his will, gave his personal estate to his executors

in trust for the use of his niece *Elizabeth*; but in case she married before she attained twenty-four, without their consent, then he gave his personal estate to his executors in trust to be disposed of and given to any child or children which then should be lawfully born of his niece *Jane*, or her eldest sister *Mary*, at the discretion of his executors or major part of them. Held, upon the marriage of *Elizabeth* before she attained twenty-four, without the consent of the executors, that she had forfeited her right to the testator's personal estate.

THIS bill was filed by the executors of doctor *Morley*, to obtain the directions of the Court in the execution of the trusts of his will.

Doctor *Morley*, by his will bearing date the 23rd of September, 1730, after giving his real estate to his niece *Elizabeth*, and her issue male and female, in strict settle-

(1) This case is taken from Lord *Hardwicke's* Note-book.

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ment, appointed his wife *Ann*, (since deceased) and the plaintiffs, guardians of his niece *Elizabeth*, and executors in trust to the use of her, "To whom I give and bequeath all my goods and chattels, not otherwise disposed of by this my will, or any codicil hereto." He then gave to his wife one half of the table and bed linen, and the other half to his niece *Elizabeth*, and the half he gave to his wife was declared to be in confidence that she would give what remained of it at her death to his niece *Elizabeth*, and he gave two pictures of himself and his wife, to his niece *Elizabeth*, after his wife's death, and then proceeded in these words, and if my said niece shall prefer to marry before she attains twenty-four, without the advice and express consent of her guardians, or the major part of them, I then give all my personal estate and every part of it which is before given in this will, to my said niece *Elizabeth*, except as hereinafter excepted, to the executors in trust before named, to be disposed of and given to any child or children which shall then be lawfully begotten of the body of my niece *Jane Robinson*, or of her eldest sister *Mury*, at the discretion of the executors before named, or the major part of them; and if my said niece *Elizabeth* shall prefer to marry without the express consent of her guardians, in such manner as is before mentioned, or if she shall die without issue before she shall come to the age of twenty-four years, I give out of my personal estate 400*l.* to the Fellows of Lincoln College, upon certain trusts.

The testator's niece *Elizabeth* married before she attained twenty-four, without the consent of her guardians, and the question was, whether she had by such marriage forfeited her interest in the testator's personal estate.

Mr. *Attorney General* and Mr. *Noel* for Mr. and Mrs. *Bacon*.

These conditions are never favoured, and in the present case the restriction is continued even after the legatee shall have attained her age of twenty-one years. This is not properly a devise over of the personal estate, but there is only a power given to the trustees to dispose of it amongst the children of the testator's other nieces. If they do not dispose of it nothing vests. The testator has left it to the discretion of the trustees whether they will take away the personal estate or not. *Sir H. Bellasis v. Ermine*, 1 Ch. Ca. 22. *Fleming v. Waldgrave*, 1 Ch. Ca. 58. *Paget v. Haywood*, 12th Nov. 1733, at the Rolls.

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Mr. *Browne* and Mr. *Fenwick* for the defendants, *Taylor* and *Cooper*, argued, that the Court always supports the forfeiture where there is a limitation over. That in the present case there is a plain trust. The discretionary power given to the trustees extends only to the proportions in which the fund is to be divided. In *Fleming v. Waldgrave*, the person whose consent was necessary, was to be benefited by the forfeiture. In *Paget v. Haywood*, there was only a direction that the money should fall into the residue.

The Lord Chancellor declared, that the interest of the defendant *Elizabeth* was forfeited by her marriage without consent.

JOHN SMITH, and JOANE, his Wife, Plaintiffs; (1)
and
WILLIAM BAKER, Defendant, *et c* *contrà*.

July 12th, 1737.

1 Atk. 385. THE original bill was for the surrender of a copyhold estate, and an account of the profits. The Cross-bill prayed, that the defendant might be quieted in the possession of the copyhold.

Where a person having purchased a copyhold in his own name and in the names of two other persons, devises it to his wife without having made a surrender, the court will supply a surrender in favour of the wife, though she is not unprovided for, as against a person who stands in the situation of a *heres factus*; and though by the custom of the manor unless a disposition is made of the copyhold in pursuance of a surrender, the beneficial interest therein goes to the next in remainder named in the grant.

Gabriel Baker, on the 1st of October, 1713, in consideration of 118l. 15s. by him paid, obtained a grant of the copyhold estate in question, to be made to himself, *John Broome*, and *William Baker*, during their lives in succession, subject to a life-estate in *Mary Palmer*.

By the custom of the manor, the purchaser of a copyhold being the first person named in the grant, has the power of disposing of the estate by deed or will made in pursuance of a surrender, but if no such disposition is made by him, the beneficial interest in the estate goes to the next person in succession.

Gabriel Baker being entitled to the copyhold in question,

(1) This case appears in Lord *Hardwicke's* Note-book, from which the statement of the case, and the arguments of counsel are taken. The judgment in *Atkins*, is corrected by a Manuscript Report of Mr. *Forrester's*.

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and to the reversionary interest in a leasehold estate for years, and to no other real estate, by his will dated the 1st of June 1720, gave all the rest and residue of his real and personal estate and all his possessions and reversions to his wife, the plaintiff *Joane*, and appointed her executrix. Mrs. *Palmer* died in 1733, and upon *Gabriel Baker's* death, the copyhold estate not having been surrendered to the use of the will, the defendant, as the next person named in the grant, took possession of the estate, and procured himself to be admitted, and insisted that by the custom of the manor, he was entitled to hold the same.

Mr. *Attorney General* and Mr. *Murray* for the plaintiff contended, that as *Gabriel Baker* had paid the purchase money for the estate, the defendant, notwithstanding the custom, was only a trustee for him, and that therefore if no devise had been made of this estate, and the plaintiff had claimed it as executrix, she would have been entitled to the relief prayed against the defendant. *Clark v. Danvers*, 1 Ch. Ca. 310. *Rundle v. Rundle*, 2 Vern. 264. *Howe v. Howe*, 1 Vern. 415., But that in the present case the copyhold was clearly intended to be devised by the will, there being no other real estate or reversions to which the words in the will could be referred, particularly as the latter word was in the plural number, and that this being the case of a wife unprovided for, the surrender ought to be supplied. •

Mr. *Browne* and Mr. *Fazakerley* for the defendant, contended, that this was not the common case of a resulting trust, that the purchaser knew the custom of the manor, and purchased subject to it, and intended that the estate should go according to such custom: that if the defendant is to be considered as a trustee, the custom will be defeated in every instance.

That as to the plaintiff's claim as executrix, copyholds are not within the statute of Frauds and Perjuries, and are not subject to debts. That the defendant being named in the grant ought to be considered as a special occupant. That as to the plaintiff's claim under the will, the copyhold is not mentioned in it, nor necessarily implied, for the words "real estate, and reversions," may be referred to the leasehold for years which is a chattel real, and that the argument arising from the word reversions being in the plural number, is too minute. That though the copyhold had been mentioned in the will, yet the surrender ought not to have been supplied, for the plaintiff is not unprovided for, the personal estate

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being bequeathed to her; the defendant is the *hæres factus* and wholly unprovided for, and stands in the place of an heir at law or remainder-man.

Evidence was offered on the part of the defendant to prove that applications had been made to *Gabriel Baker* to surrender the copyhold to the uses of his will, and that he had refused, and said that he intended the estate for the defendant.

The *Lord Chancellor* refused to admit this evidence, saying that supposing this to be only a resulting trust by law, it would be dangerous to admit parol evidence against the operation of law; but that the question here was, whether these lands were intended to pass by the will, and this evidence was to explain the testator's intention in his will, contrary to the case of *Browne v. Selwyn* in the House of Lords, which is against all parol evidence to explain a will, although the will was there of personal estate, and contrary to the former authority of *Littlebury v. Buckley*, and several former cases.

Upon the principal point his lordship delivered the following opinion:

July 12, 1737.

LORD CHANCELLOR.—This appears to me to be a plain case for the plaintiff upon the first point, for though the legal estate is by the custom in the next life, yet I think that in equity there is a resulting trust for the representative of the plaintiff's husband who purchased this estate.

I do not however think it necessary for me absolutely to determine this point, although the cases upon it are very strong, particularly that of *Benger v. Drew*, 1 P. Wms. 781.

He who pays the price has a resulting trust at law excepted out of the statute of Frauds, though the conveyance is taken in another name, and this will not defeat the custom where the three are joint purchasers.

But I do not determine this point because the present case rests upon the second.

The first consideration upon the second point is, whether these lands are comprised in the will.

I think they plainly are.

Where a man
devises all his
estate real, and
personal to a wife or child, and has no other real estate but the copyhold, it shall pass by those general words. (1)

Where a man devises all his real and personal estate in possession and reversion to a wife or child, and has no other real estate but the copyhold, it shall pass by those

(1) Where copyhold lands are surrendered to the use of the will, by a devise of lands generally, they will pass, notwithstanding there are freeholds to

real estate but the copyhold, it will pass by the general words; but this depends upon the circumstances of the case.

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There are words at the outset of the will which have not been taken notice of, As to all my temporal estate, which it has pleased God Almighty to bless me with, I dispose of as follows.

Here is a plain intention to dispose of his whole estate, and the subsequent words are general enough to carry it; his leasehold estates for years can never satisfy the word real in the will, for it is called a chattel real only, as it is derived out of the real estate, and the word reversions will be inoperative, unless construed to refer to the copyhold estate.

The next consideration upon the second point is, whether she is entitled to have the want of a surrender supplied.

As to the objection, that she is not a wife unprovided for, it has not appeared to me that the wife is provided for, the quantum of the other estates not having been proved: but even allowing she has another provision, yet the husband might not think it sufficient, and therefore I do not look upon this case to be out of the common one, where the court will supply the surrender if he devises the copyhold to her.

It has likewise been objected, that the court will not supply the surrender against an heir, but this rule must be applied solely to an heir in blood, who is of kin to, and represents the testator, and not to a *hæres factus*, for the defendant here is merely nominal, and not even the least relation, but barely of the same name.

His lordship decreed that the plaintiff was entitled to the equitable interest in the estate, and that the defendant should deliver up the possession to her, and that she should enjoy against him, and all claiming under him, and that he should answer for the profits. (2)

answer such devise. *Tendril v. Smith*, 2 Atk. 85. So where the devisee has only an equitable interest in the copyholds, though there has been no surrender. *Tuffnell v. Page*, 2 Atk. 37. *Carr v. Ellison*, 3 Atk. 73. But it is otherwise where the legal estate is in the devisor, and no surrender has been made. *Hawkins v. Leigh*, 1 Atk. 387. But now by 55th G. 3. c. 192., where the custom of the manor warrants a disposition by will, such disposition

shall be valid, though no surrender shall have been made to the use of the will. This statute only applies to a mere formal surrender, and does not apply to a case, where by the custom of the manor, there must be a separate examination of the feme-covert, previous to a surrender being made. *Doe dem. of Nethercote v. Bartle*, 5 Barn. & Ald. 492.

(2) Reg. Lib. B. 1736. fo. 476.

By the marriage articles between the testator and his late wife, dated the 28th of January, 1722, it was agreed that 600*l.*, part of the wife's portion, should be laid out in land; and that the land should be settled to the use of the testator for life, remainder to the wife for life, remainder to trustees for 500 years, remainder to the heirs of the body of the wife by the testator to be begotten, remainder to the right heirs of the husband. On the 29th of December, 1726, the testator surrendered all and every part and parcel of his copyhold lands within the manor of *Knowle*, and the reversion and reversions thereof, to such uses as he should appoint by his last will, to be executed in the presence of three witnesses.

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On the 21st of August, 1728, the testator made his will, in the following words: "I will that my debts, funeral expenses, and the sum of 5*l.* to *Joseph Boston*, of *Balsal Street*, be paid by my executrix, and within one month after my decease. *Item*, I will that my executrix, and her heirs, shall yearly and every year for ever, upon the 2d of September, give to six of the poorest and most proper objects of charity, within the manor of *Knowle*, that duly attend the service of the church, a dark gray cloth coat or gown, of ten shillings price; and I will that 4*l.* per annum be charged on the tenement at *Knowle* for that purpose; And if my daughter should not have any issue, then I give to my brother, and the minister of *Knowle*, for the time being, 2,000*l.* in trust, for ever, that they or their heirs, for ever, see that the interest of the said 2,000*l.* be applied to the best charity they can think upon. All the residue of my estate, real and personal, goods and chattels, whatsoever, I give to my daughter, *M. Harborne*, whom I make sole executrix of my will."

The testator received the 600*l.* agreed by the marriage

of debts. *Powell v. Robins*, 7 Ves. 209.

Whether it requires a stronger inference of intention to charge real estates with legacies than debts seems doubtful.

Lord *Alvanley* was of opinion, that it required stronger words to charge lands with legacies than debts. *Kightly v. Kightly*, 2 Ves. jun. 329.

Lord *Loughborough* did not know how to state a difference between debts

and legacies. *Williams v. Chitty*, 3 Ves. 551. But Lord *Alvanley*, after adverting to Lord *Loughborough's* opinion, upon reflection, remained of the same opinion. *Keeling v. Brown*, 5 Ves. 362.

In *Bamfield v. Bamfield*, cited in argument, Lord *Talbot* seems to think that there is a difference between debts and legacies.

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articles of 28 January, 1722, to be laid out in land, and it was never so invested.

The testator survived his wife, and the daughter survived him, and died without issue.

The questions were, whether the legacy of 2,000*l.* was good at all; and if good, whether it was intended to be a charge upon the copyhold estates; and, lastly, whether the 600*l.* was to be considered as money or land.

The *Attorney-General* and Mr. *Fazakerley*, for the plaintiff, argued that the testator intended to make the 2,000*l.* a charge upon the copyhold estate. He had no other real estate, and after giving this legacy of 2,000*l.* gives all the residue of his real estate to his daughter, meaning so much as should remain after his prior gifts were satisfied. *Trott v. Vernon*, Pre. in Ch. 430. 2 Vern. 708. In *Weal v. Morris*, 23 July, 1734, at the Rolls, the words were, "My will is, that all my debts be in the first place paid." The testator then gave several legacies, and then gave all the residue of his real and personal estate. In the *Earl of Warrington v. Leigh*, 1 Bro. P. C. 94, the words were, "As to the wordly estate which God has blessed me with, I give and dispose thereof as follows. *Imprimis*, I will that all my debts be paid." In *Bamfield v. Bamfield*, 31 July, 1734, before Lord *Talbot*, the words were, "As to my wordly estate, I give and dispose thereof as follows." He then gave 2,500*l.* to his wife, and 20,000*l.* to his daughter. "All the rest and residue of my real and personal estate I give to my two brothers." And Lord *Talbot* said, that as to the distinction between debts and legacies, a wife and daughter were a kind of creditors. So *Robinson v. Robinson*, 20 May, 1736, before the *Master of the Rolls*.

As to the 600*l.* it must be considered as personal estate. The testator has his election to take it as personal estate or as money, and he has made his election by keeping it in his hands as money. His heir cannot insist against him, that he was guilty of a breach of trust.

Mr. *Noel* and Mr. *Murray* for the defendant *Bradley*, who was the customary heir, contended, that the heir at law ought not to be prejudiced by any but necessary implication, and that the present case was very distinguishable from those cited; for here the testator does not begin by making his real and personal estate as one fund for the payment of his debts. The surrender to the uses of his will is not with-

out effect, for the 4l. *per annum* is charged upon the copyholds. ATTORNEY-GENERAL

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Mr. *Floyer* and Mr. *Wilbraham* for the defendants, *Wheeler* and *Loggen*, and *Osborne* and his wife, the heirs at common law, contended that the 600l. was to be considered as land, and was not charged with the legacy. If the money had been laid out according to the agreement, the testator would have had only an estate subject to the tenancy in tail of his daughter, which is not respected in law, and after his death the daughter might have insisted upon the money being invested in land. In *Lechmere v. Lechmere*, Ca. Temp. Talbot 92, and 3 P. Wms. 211, 228, it was held, that an heir at law was entitled to the benefit of his ancestor's covenant.

His Lordship, as to the charity of 4l. a-year, charged by the testator *Thomas Harborne's* will on his copyhold tenement in *Knowle*, declared that the same ought to be established and paid out of the said copyhold tenement, and decreed an account of the 4l. *per annum*; and as to the 2,000l. so far as to charge the real estate therewith, dismissed the bill. And his Lordship directed that the debts, funeral expenses, and legacies should be paid out of the personal estate of the testator; and his Lordship declared that the sum of 600l., part of the testator's wife's portion covenanted to be laid out in land, was to be considered as a debt of the testator, to be satisfied out of his personal estate; and if the said testator's personal estate should fall short to pay his debts, funeral expenses and legacies, then it was ordered that as to so much of his personal estate as should be exhausted by the payment of his debts and funeral expenses, the relators should stand in the place of the creditors, and to have satisfaction of the said 2,000l. and interest *pro tanto* out of the said testator's real (2) estate, and it was ordered that the same be borne and paid rateably and proportionably between the sum of 600l. which was to be considered as part of the real estate of the said testator, and the copyhold land.(3)

By marriage articles it was agreed, that 600l. should be laid out in land, and that the land should be settled to the use of the husband for life, remainder to the wife for life, remainder to the heirs of the body of the wife by the husband, remainder to the right heirs of the husband. The 600l. was received by the husband, and never invested in land. The husband having survived his wife, and left a daughter, who died without issue, it was held, that the 600l. must be considered as real estate.(1)

(1) So *Lingen v. Sowray*, 1 P. Wms. 172. *Disher v. Disher*, 1 P. Wms. 204. and see *Pulteney v. Lord Darlington*, 1 Brown's Ch. Ca. 223. *Wheldale v. Partridge*, 5 Ves. 397. 8 Ves. 227. *Biddulph v. Biddulph*, 12 Ves. 161. *Kirkman v. Miles*, 13 Ves. 338. *Stead v. Newdigate*, 2 Merivale's Rep. 521.

(2) This charitable bequest was not affected by the statute of mortmain. The Court does not now marshal assets to pay charity legacies. *Attorney-General v. Tyndall*, Ambler's Rep. 615. *Makeham v. Hooper*, 4 Brown's Rep. 155.

(3) Reg. Lib. A. 1736. fo. 653.

WILLIAM DAWSON, Executor and
Residuary Legatee of LADY BAR-
BARA FITZROY } Plaintiff;
and
The DUKE of CLEVELAND, ANN,
DUCHESS of CLEVELAND, Execu-
trix to the late DUKE, HENRY
VANE and LADY GRACE his Wife,
JOHN PADDY and LADY ANN his
Wife, two of the Daughters of the late
DUKE, and THOMAS PULTENEY,
a Trustee } Defendants.(1)

July 15th, 1737.

Where under letters patent 3,000*l.* per ann. was granted out of the hereditary excise, with a power for the grantee, after the commencement of the estate in possession, and during the continuance of his estate and interest therein, to appoint part of the premises, so being in his possession, for raising portions for younger children. An appointment made by the grantee, to commence after his death, was declared void. And where the father made an appointment of part of the premises, for raising 8,000*l.* for the marriage portion of one of his daughters, and as to the residue amongst his other younger children, and afterwards gives that daughter a marriage portion of 20,000*l.* It was held, that the other younger children were not entitled to the 8,000*l.*, but that the father became a purchaser of, and was entitled to the 8,000*l.*(2) and interest, from the time of the marriage of his daughter.

KING CHARLES the 2d, by letters patent, dated the 22d of October, in the 26th year of his reign, granted to the Dukes of *Cleveland, Northumberland, and Grafton*, 3,000*l.* per annum each, out of the hereditary excise, and to the heirs of their respective bodies, with cross remainders to them and their heirs male, with power for every of them to make a jointure of one third part; and it was further granted to them respectively that they might, after the commencement of the estate in possession, and during the continuance of their respective estates and interests, by writing under their hand and seal, appoint any other part of the premises, so being in his or their respective possession, not exceeding one other third part of the whole, for any number of years not exceeding twenty-one years, in order to and for the purpose of raising portions for his or their daughter or daughters, younger son or sons, respectively, which said limitations and appointments were to be as good and effectual as if the persons were actually named.

(1) The statement of this case, and the substance of the decree, are taken from the *Lord Chancellor's Note-book*. The language of the judgment from Mr. *Forrester's* manuscript report.

(2) See *Pitt v. Jackson*, 2 Bro. Ch.

Ca. 55. *Smith v. Lord Camelford*, 2 Ves. jun. 698. *Folkes v. Western*, 9 Ves. 456. *Noel v. Lord Walsingham*, 2 Sim. & Stuart's Rep. p. 111. and see *Metcalf v. Ives*, ante, p. 82. and the notes to that case.

The late Duke having become entitled to an additional 1,000*l.* *per annum*, upon the death of the Duke of *Northumberland*, on the 20th of July, 1722, appointed 1,000*l.* and 336*l.* 6*s.* 8*d.* *per annum*, to trustees, to hold for twenty-one years, *to commence from and after his death*, in trust for his younger children, in such proportions as he should appoint, and in default of appointment, in equal proportions between them, reserving a power of revocation to himself.

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On the 22d of July, 1724, the late Duke made a second appointment of the same sums of 1,000*l.* and 336*l.* 6*s.* 8*d.* *per annum*, to the defendant *Pulteney* and another, to hold from the day next before the day of the date of the appointment for twenty-one years, upon trust, by sale or mortgage of both or any part thereof, to raise 8,000*l.* for the marriage portion of *Lady Grace*, provided she married with consent, &c.; as to the residue remaining unsold, or subject thereto, upon trust, yearly to receive the same during the term, or to sell the same and apply the money amongst the Duke's other younger children as he should appoint, or in default of appointment, equally amongst them, provided that until any of the daughters attained twenty-one, the trustees should place out the money at interest, except so much as should be applied for their maintenance.

Afterwards, upon the marriage of *Lady Grace* with the defendant, *Mr. Vane*, the late Duke gave her a marriage portion of 20,000*l.*

Lady Ann, another daughter, married the defendant, *Mr. Paddy*. The Duke died in 1730, and *Lady Barbara Fitzroy*, the only remaining younger child died, having by her will, bearing date the 20th of March, 1733, made the plaintiff her executor and residuary legatee.

The object of the bill was to have *Lady Barbara's* share of these two annuities of 1,000*l.* and 336*l.* 6*s.* 8*d.* raised and paid to the plaintiff as her executor.

The questions which arose were, 1st, Whether the first or second appointment should take effect. If the second, then 2dly, Whether *Lady Grace* was, notwithstanding her marriage portion of 20,000*l.*, entitled to the 8,000*l.* If not, 3dly, Whether the other younger children were entitled to have it divided between them. If not, 4thly, Whether it belonged to the personal representative, or to the heir of the late Duke.

Mr. Floyer and *Mr. Wilbraham* for the plaintiffs, contended, that the first appointment was good, and that *Lady*

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Grace could not be entitled to a double portion; that the 8,000*l.* would fall into the whole fund, for the benefit of the other younger children; and likened it to a case of the custom of *London*, where a child is advanced.

The *Attorney-General* and Mr. *Brown* for the defendant, *Southcote* and the Duchess of *Cleveland*, contended, that there were no words in the proviso to restrain the Duke from making an appointment to take effect after his death; that the Duke had become the purchaser of the 8,000*l.*; that it was not like the case of the custom of *London*.

July 15, 1737.

The *Lord Chancellor* decreed that the appointment of 1724 was to take effect, the former one not being in pursuance of the power, inasmuch as the term was to commence *in futuro*; and he compared it to the common case of a power in a tenant in tail to make leases, which must be executed *in presenti*. As to the 8,000*l.* his Lordship said, that where a marriage settlement provides portions to be raised for children, if the father, without taking notice of it, gives the child an equal or greater portion, the portion so provided for shall go to the father or his representative, or sink into the inheritance, according to the circumstances of the case. That where the father, in such case, dies without doing any act affecting a term to raise portions, such term has been construed to be extinguished for the benefit of the heir. But if the father does any act to shew an intention of considering himself as the purchaser of the term, by the portion given, as by assigning it, &c. it has been decreed to be raised for the benefit of the father's representatives, but that in the present case the plaintiffs had clearly no title to any share of the 8,000*l.*

His Lordship decreed that the appointment of 1724 was to take effect, and that the executrix of the late Duke was entitled to the 8,000*l.* and interest, from the time of the marriage. (3)

(3) By the decree in the Register's Book, it is stated, that the late Duke of *Cleveland* having paid a portion on the marriage of the Lady *Grace Vane*, greater than the sum of 8,000*l.* provided

by that deed that the sum of 8,000*l.* and such interest as ought to be paid for the same, ought to accrue to his personal estate. Reg. Lib. A. 1736. fo. 560.

SEYMOUR v. TREVILYAN and Others.(1)

July 16th, 1737.

THIS was a bill brought by the trustees of Mr. *Portman's* will, for carrying into execution the trusts of his will. 3 Atk. 358.

away a wife's paraphernalia, he can only bar her by acts done in his life-time.(2) A husband cannot devise his life-time.(2)

Mr. *Portman* by his will of the 31st of January, 1723, gives his wife 10,000*l.* in full of all her dower and thirds, and in full satisfaction of any lands he had settled on her for life; and he gives her all her wearing apparel, and ornaments of her person, the gold watch and great pearl necklace which she usually wore, his snuff-box which came from *France*, and all his jewels, except those set about Sir *William Portman's* picture, which he gave to his niece, wife of the defendant *Berkeley*; and all the residue of his personal estate he gives to his executors, for the purposes mentioned in his will.

By a codicil of the 13th of March, 1723, he revoked the legacy of his great pearl necklace and jewels devised to his wife by the will, and ratifies his will in all other respects.

By another codicil of the 16th of April, 1726, he gives to his wife his diamond ear-rings, which cost near 1,200*l.*; to the Earl of *Powlett* his snuff-box, that had a cornelian stone thereon; and to his godson *Courtenay*, son of Sir *William Courtenay*, his snuff-box set with diamonds, and ratifies his will in all other respects.

The testator's widow afterwards intermarried with the defendant *Fownes*.

Mr. *Fazakerley* for the plaintiff.

The *Attorney-General* for the defendants *Fownes* and his wife.

LORD CHANCELLOR.—That it is a general rule of equity where the demands are of the same kind of estate, that you cannot claim under and yet controvert the testator's intention.

(1) The statement of this case is taken from Lord *Hardwicke's* Notebook. The judgment from a manuscript report by Mr. *Forrester*. This case is reported in *Atkyns*, under the

name of *Seymore v. Tresilian*.

(2) See *Northey v. Northey*, post. *Marshall v. Blew*, 2 Atk. 217. *Hastings v. Douglas*, Cro. Car. 343.

SEYMOUR But I give no opinion where they are different.
 v.
 TREVILYAN. It is plain the paraphernalia are included in the devise in
 the will ; but a husband cannot devise away a wife's para-
 phernalia, he can bar her only by act done in his life-time.

Tipping v. Tipping, 1 P. Wms. 730.

The revocation is of the devise of his jewels, which seem to be contradistinguished even in the will from hers, which are there called the ornaments of her person, and the diamond ear-rings do not appear ever to have been worn by her, and therefore might be no part of her paraphernalia.

But suppose the testator had completely revoked the devise, it was only a revocation of a devise, void in itself, and it is therefore too remote to infer from thence an intention that her rights should pass by the devise of the residue of his estate.

The law in the latter cases, has gone strongly in favour of paraphernalia, I remember this case in Lord *Macclesfield's* time ; *Tipping v. Tipping*, 1 P. Wms. 729. ; Husband had devised his lands for payment of his debts ; The creditors had exhausted the personal estate, and amongst the rest the wife's paraphernalia ; and on a bill brought by her, my Lord decreed that she should stand as a creditor for them on the real estate.

And his Lordship declared that the defendant *Meliora*, the wife of the defendant *Fownes*, is entitled to her paraphernalia, except the great pearl necklace ; and the Master is to enquire of what particulars such her paraphernalia consisted, and what jewels, utensils, and other things had been given to her by her husband, or by any other person by his consent or approbation in his lifetime, the same to be delivered to or retained by the defendants *Fownes* and his wife, as the said Master should direct. (1)

ELIZABETH TAYLOR, Widow and Ex-
 ecutrix of THOMAS TAYLOR . . . } Plaintiff;
 and
 JOHN TAYLOR, Brother of THOMAS
 TAYLOR, and Administrator of JOHN
 TAYLOR the Father, HENRY MOORE,
 and THOMAS JORDAN Lord of the
 Manor } Defendants. (1)

July 18th, 1737.

1 Atk. 386.

THE bill was for an account of the personal estate of *John Taylor*, the father, and for payment of the distributive share which belonged to *Thomas*, the son, and to supply the surrender of certain copyhold estates devised by the will of *Thomas*, the son.

A father purchases a copyhold estate in the name of his son, then of the age of eighteen, and the father continues in possession till his death. Upon evidence, that the father had declared that he had made the purchase for his son's benefit, this shall be considered as an advancement of the son, and not a trust for the father, though the son had given two receipts for rent for the use of his father. (2)

In 1720, the father purchased a copyhold estate in the name of *Thomas*, his son, who was then eighteen years of age. The father continued in possession till his death, which happened in 1731, upon which *Thomas*, the son, entered. On behalf of the plaintiff, evidence was adduced of the father's having declared that he had purchased the estate for the sole use and benefit of his son *Thomas*, and of the de-

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*.

(2) *So Elliott v. Elliott*, 2 Ch. Ca. 231. *Mumma v. Mumma*, 2 Vern. Rep. 19. *Stileman v. Ashdown*, 2 Atk. 478. And when the father is dead, the same rule prevails between grandfather and grandchildren, *Elrand v. Dancer*, 2 Ch. Ca. 26. So where a father buys an estate in the name of his son and a trustee, the son being only of the age of eight years at his father's death, *Lamplugh v. Lamplugh*, 1 P. Wms. 111. So where a purchase is made by a father in his own and his son's name, *Scroop v. Scroop*, Ch. Ca. 28. *Back v.*

Andrews, 2 Vern. 120. So where a father purchased a copyhold which was granted according to the custom of the manor, to himself, his wife, and his son, to take for their lives in succession, and the life of the survivor, *Dyer v. Dyer*, 2 Cox. Ca. 92. *Murless v. Franklin*, 1 Swan. Rep. 14. But in order to repel the presumption that a purchase by the father is intended as a provision for his children, it is necessary that the evidence should be contemporary with the purchase. Subsequent acts will not convert an advancement for his son, into a beneficial purchase for himself, per Lord *Eldon*, *Murless v. Franklin*, *ibid*.

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v.
TAYLOR.

fendant *John* having admitted that he knew that his father had purchased the estate for the benefit of *Thomas*. On the part of the defendant, it was proved that *Thomas* had in 1723 and 1724 given two receipts for rent, for the use of his father.

Where a testator devises two-thirds of a copyhold to his wife, and the remaining third to the child or children, with which his wife is now ensient, and if such child or children shall not be born alive, or being born alive, shall die without issue, then to his wife; the wife not being with child. It was held that the will must be construed as if the testator had said, "If no child be born alive."

In 1733, *Thomas*, the son, married the plaintiff, and by his will, dated the 24th of June, 1734, devised as follows:—
All my estate, whether real or personal, including my copyhold lands, which I have or intend to surrender to my will, I give two-thirds thereof to my dear wife, and the remaining third I give to the child or children with which my wife is now ensient, and to the heirs of such child or children for ever; and if such child or children shall not be born alive, or being born alive, shall die without leaving lawful issue, or before he or she, or they have power to dispose of the same; then I give the said one-third to my wife and her heirs.

Thomas, the son, died without having surrendered the copyhold to the uses of his will, and his wife the plaintiff proved not to have been with child.

The personal estate of *Thomas* was insufficient to pay his debts. The distributive part of the personal estate of *John*, the father, was considerable.

The questions were—

1st. Whether *Thomas*, the son, was entitled to the copyhold purchased by his father in his name.

2dly. Whether the want of a surrender ought to be supplied for the benefit of the plaintiff.

3dly. Whether the plaintiff was entitled to the remaining one-third of the copyhold estates of *Thomas*, the son, under his will.

Mr. *Attorney-General*, Mr. *Browne*, and Mr. *Green*, for the plaintiff.

In *Grey v. Grey*, 1 Ch. Ca. 296., and *Mumma v. Mumma*, 2 Vern. 19. Eq. Ca. Abr. 382. pl. 8., a purchase by a father was held to be an advancement of the son, in whose name it was made, although the father continued in possession.

So in *Hobart v. Hobart*, before Lord *Talbot*.

Mr. *Faxakerley*, for the defendant *John Taylor*, contended that the father's continuing in possession was inconsistent with any intention of advancing the son, and that the receipts given by the son for the use of the father, amounted to a declaration that he was not beneficially entitled.

As to supplying the defect of the surrender, that the heir at law had no other provision from his brother, and as to him, would in that case be absolutely disinherited.

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That as to the devise of the one-third of the copyholds, it was made upon a contingency which has not happened, namely, that of the wife being with child, and of the child not being born alive.

LORD CHANCELLOR.—I am of opinion it should be considered as an advancement for the son, and found my opinion greatly on the case of *Mumma v. Mumma*, 2 Vern. 19. (3) And though two receipts are produced under the son's hand, for the use of the father, I think that will not alter the case, for the son, being then under age, could give no other receipt in discharge of the tenants who held by lease from the father; and in this case I am of opinion, parol evidence may be admitted, though indeed improper, when offered against the legal operation of a will, or an implied trust, but here it is in support of law and equity too. (4)

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As to the one-third of the copyholds, I am of opinion it was well devised, and passed by the will, so as to have a surrender supplied, and that it ought to be construed as if he had said, "And if no child be born alive."

His Lordship declared the copyhold estate at *Little Shellwood*, was purchased by *John Taylor*, for the benefit of, and by way of advancement for *Thomas Taylor*, the son, and decreed that the defect of the surrender to the use of the will ought to be supplied, and that the defendant, the heir at law of the testator should surrender the copyhold land accordingly. (5)

(3) There the father purchased a copyhold in the name of the defendant, his eldest son, an infant of eleven years old, and enjoyed during his life, and afterwards having surrendered it to the use of his will, devised it to his wife for life, remainder to his younger children, and made other provisions for the defendant; who having recovered in ejectment, the bill was to be relieved against it. Lord Chancellor *Jefferies*

conceived that he being but an infant at the time of the purchase, though the father did enjoy during his life, that the purchase was an advancement for the son, and not a trust for the father. Eq. Ca. Ab. 382. pl. 8.

(4) 1 Vern. 467. Eq. Ca. Ab. 382. *Shales v. Shales. Gray v. Gray*, 1 Ch. Ca. 216.

(5) Reg. Lib. B. 1736. fol. 488.

JOANE ATKINS, Administratrix of }
 ELIZABETH HICCOCKS . . . } Plaintiff; (1)
 and
 MARGARET HICCOCKS, Executrix of }
 SAMUEL HICCOCKS, who was sur- }
 viving Executor of WILLIAM HIC- } Defendants.
 COCKS, GEORGE THOMAS and }
 MARY his Wife }

July 19th, 1737.

1 Atk. 500.

A testator bequeaths to his daughter 200*l.* to be paid to her at the time of her marriage, or within three months after, provided she marries with the consent and approbation of his two sons, or the survivor, and he directs that his daughter until marriage, shall yearly receive the sum of 12*l.*, and he charges a leasehold estate with the payment of the yearly sum of 12*l.*, and also of the said sum of 200*l.*, when the same shall become due as therebefore is appointed; his daughter having died without having been married: It was held, that this legacy was not vested, and not transmissible to her representative. (2)

Item. I give unto my daughter *Elizabeth Hiccocks*, the sum of 200*l.* to be paid her at the time of her marriage, or within three months after, provided she marries with the consent and approbation of my sons *William Hiccocks* and *Samuel Hiccocks*, or the survivor of them, and my will and

(1) This case is copied verbatim from a manuscript in Lord *Hardwicke's* handwriting.

(2) So *Garbut v. Hilton*, 1 Atk. 381. *Elton v. Elton*, 3 Atk. 504. *Hemings v. Munckley*, 1 Bro. Ch. Ca. 303. But a distinction has been made between a particular legacy and the bequest of a residue, upon the ground of preventing an intestacy; as where a testator after giving a legacy to *R.*, and whom he made sole executor, bequeathed the residue of his estate to *R.* and *J. C.* upon trust to invest upon government, or real securities in their names, or the name of the survivor, and to pay the *dividends* and *produce* equally between his two great nieces, until their respective marriages, and after their respective marriages, to assign and transfer their respective moieties or shares thereof unto them respectively; it was

held under the circumstances of the nieces being adult at the date of the will, the whole of the interest being given to them, the marriage not being a condition precedent to the vesting, and of its being a residue without any bequest over, that upon the death of one of the nieces without being married, the moiety of the residue vested in her and passed to her representative. *Booth v. Booth*, 4 Ves. 399. With respect to *Booth v. Booth*, Sir William Grant says, "Lord *Alvanley* felt he had a difficult case to deal with. Some violence was done to the words in favour of what he conceived to be, and what in all probability was, the intention." *Leake v. Robinson*, 2 Meriv. Rep. 387. But if it be a residue with a bequest over, there is no difference between a residue and particular legacies, *ibid.*

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meaning is, that my said daughter *Elizabeth* shall *yearly* receive and be paid, (until such time as she shall marry,) the sum of 12*l.* free and clear of all taxes and impositions whatsoever. And my will and meaning further is, *that* my leasehold estate commonly called *Hull's* lease, shall stand and be charged and chargeable *with the payment* of the said yearly sum of 12*l.* as aforesaid, and also of the said sum of 200*l.* when the same shall become due, as hereinbefore is appointed and declared.

Then he gives to his son *William Hiccocks*, the said leasehold estate called *Hall's*, subject nevertheless to the payment as aforesaid, and makes his two sons *William* and *Samuel Hiccocks* and his daughter *Elizabeth*, executors and executrix of his will, and gives them the residue of his personal estate, equally to be divided between them.

The testator died, afterwards *Elizabeth* the daughter died *without having ever been married*, and the plaintiff as her administratrix, has brought this bill to have the legacy of 200*l.* raised out of the leasehold estate on which it is charged, and that it may be paid to her.

The general question is, whether this legacy is due, the legatee dying before marriage.

That depends on this question, whether the legacy was vested in the legatee so as to be transmissible to her representative. And I am of opinion, that it never vested in the legatee; and, consequently, that the plaintiff, her administratrix, cannot demand it.

It has been settled by many resolutions, and therefore must be admitted, that where a legacy is given to one *to be paid at a time certain*, or which can be reduced by computation to a certainty, as at the age of twenty-one, in that case, though the legatee dies before the time of payment comes, the legacy is vested and transmissible upon this difference, that the *time* is annexed not to the *thing* or substance of the legacy, but to the *payment*, or (as it is called) the *execution* of it. This has been established in this Court ever since *Clobery's* case in 2 Vent. 342., and is the rule both of this Court, and of the ecclesiastical courts, and the executor or administrator may demand it at such time as the legatee would have attained her age of twenty-one.

But in that case the time of payment is *certain*; and must in all events necessarily come, and therefore it was reasonable to construe it as being *debitum in præsentì sol-*

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vendum in futuro, agreeably to the rules of law in other cases.

But I can find no case or authority whereby it has been determined either in this Court or in the ecclesiastical court, where these legatary questions properly arise, that when the *time* annexed to the payment or execution of the legacy is merely eventual or contingent, and may by possibility either come or not come, and the legatee dies before it happens, that in such case the legacy is vested and transmissible to his representative.

This being so, I am left to determine upon the reason of the *thing*, and the general rules laid down in the law books.

1. Upon the reason of the thing taken abstractedly from the authorities, there appears to me a substantial difference between the one case and the other.

Where the *time*, though *future*, is certain, and must in all events arise, it is a plain indication of the testator's intention that the legacy should in all events be paid, and the question is only upon the *time when*, which either is or by computation may be made certain, upon the rule *certum est quod certum reddi potest*.

But where the time is absolutely uncertain, depending upon the happening of a fact or an event, it is plain that the testator did not regard the *point of time*, but that *fact or event*, and intended the legacy should be paid only on the happening of the fact or event, and this makes such an appointment of the time of payment amount to the same thing as if the legacy was made payable on a *condition or contingency*, in which case it is clear that the legacy cannot be demanded unless the condition be performed, or the *contingency* happens.

In the case at bar, the sum of 200*l.* is made *payable at the time of Elizabeth's marriage*, therefore it was the event of her marriage, and not merely the time which the testator had in his own view and intention, and as she is dead without being married, that event can now never happen.

To this it was objected by Mr. *Attorney-General*, on the arguing of the case, that the case does not differ in this respect from a legacy made payable *at the age of twenty-one*, for there is not only a point of time included, but an event also, which is contingent, whether the legatee will ever attain that age or not.

But to this the answer is, that it has always been con-

sidered as a description of time, and by computation is as certain and fixed as any other time; and the testator's intention in suspending the payment till the age of twenty-one has always been taken to be only by reason of the legal incapacity of the legatee till he arrives at that age, when the law presumes him competent to give a discharge for it, and to manage himself and his affairs.

2dly. Agreeably to this reasoning are the rules laid down in the law books which relate to those questions.

Dig. Lib. 35. tit. 1. *de conditionibus et demonstrationibus*, Leg. 1.

Legatis quæ relinquantur aut dies incertus aut conditio adscribitur; aut si nihil harum factum sit, præsentia sunt, nisi si vi ipsa conditio insit.

Here you observe a time absolutely uncertain is put upon the same footing with a condition; but what follows is still more express, and that is in the same Book of the Digest, and the same title, Leg. 75.

Dies incertus conditionem in testamento facit.

Both these passages are the text law, and full to the present purpose.

But as the civil law is no otherwise of authority in *England* than as it has been received and allowed by usage, let us see how it is laid down by writers of our own who treat of it upon that footing.

Swinburne, part 4., sec. 17., treats professedly of this question; and there he fully allows the difference between a time certain and a certain age being annexed to the *substance* or to the execution of the legacy, according to the rule in *Clobery's* case; but he expressly takes the distinction between a time certain and a time or event uncertain, and in page 267 of the old Edition says, an uncertain time is compared to a condition. And page 268 he has these words:—"Neither is it material whether the uncertainty be joined to the substance of the legacy or disposition, or to the execution thereof, for in both cases the legacy or disposition is reputed conditional."

And page 272, he puts this case in point:—"If the testator bequeaths to *A. B.* 100*l.* which he willeth to be paid at the day of her marriage; if she die in the mean time the legacy dieth also; and therefore is not recoverable by her executors or administrators."

Godolphin, in his *Orphan's Legacy*, page 453, is very full to the same purpose.

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If the day be certain, *he* says, though the legatee dies before it comes, the legacy shall accrue to his executors ; for in that case the legacy was due at the testator's death, though not payable till that time certain be come. But if the day or time be altogether uncertain the legacy is then *as if it were conditional*, and the breach or non-accomplishment of a condition in itself lawful or possible, doth either suspend or extinguish the legacy.

In order to encounter the doctrine laid down in these books, a case was cited by Mr. *Attorney-General*, adjudged on a devise of a real estate in a court of common law. It was *Thomas v. Howell*, Trin. 4 W. & M. B. R. 1 Salk. 170.

One devised land to his eldest daughter upon condition that she should marry his nephew at or before her attaining the age of twenty-one.

The nephew died young, and the daughter never refused and indeed never was required to marry him. After the death of the nephew, the daughter being about seventeen, married *J. S.*, and it was adjudged in C. B. that the condition was not broken being become impossible by the act of God ; and the judgment was afterwards affirmed in error in B. R.

But that case differs totally from the present; there the condition was subsequent and plainly became impossible by the act of God, which always excuses the non-performance of a subsequent condition.

The daughter had time to marry him till he attained twenty-one. And he died long before.

In the case in question, the condition did not become impossible for she was not restrained to marry a particular person, but might have married any man ; and it must be presumed that it was in her power to have married somebody or other before her death.

Besides, I take the *condition of marriage* in this case to be a condition precedent.

One objection was made on the part of the plaintiff, which deserves to be considered in this place, that by the intent of the testator appearing in his will this legacy must be taken to be vested, because he has given interest (1) for it in the mean time.

(1) Where the whole interest has been given it has always afforded a strong presumption of intention to vest the capital, *Fonnereau v. Fonnereau*,

That the 12*l. per annum* was at the time of making this will just equal to the legal interest of 200*l.*; and in cases of legacies *given at the age of twenty-one*, if interest has been given in the mean time they have been held to be vested; and that this case falls under the same reason.

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The case referred to is right, but it is not similar to the present, for there the *time is certain*, and there is no resolution or book-case where that has been so held upon an uncertain time of payment or a time depending on a contingent event; consequently no inference can be drawn from that case.

Besides in this will it is not given as interest, but by way of annuity issuing out of a leasehold estate; and it is material to observe upon the penning of this will, that the testator has charged the same leasehold estate *with the payment of the said sum of 200*l.*, when the same shall become due as hereinbefore is appointed.*

These words express that he intended and understood that the 200*l.* should not be *due*, *i. e.* in other words *vested* till the time at which he had appointed it to be paid.

But here is another point in this case which makes it a very strong one against the legacy being transmissible to the administrator, which is the condition of marrying with the consent of the executors; *provided she marries* with the consent and approbation of my sons *Wm. Hiccocks* and *Samuel Hiccocks*, and the survivor of them.

It is true that as the legacy is not given over in case of marrying without such consent, it would have been construed to be only *in terrorem*; but still according to all the books and cases on this multifarious head a marriage in fact is necessary to make the legacy become due and payable.

So is Swinb. part 4. sect. 12. : his words are "Where it is said, before that the condition of marrying with the consent of another is void, so that the executor or legatory on whom the condition is imposed is neither bound to obtain nor yet to crave such consent; yet the person on whom the condition is imposed cannot be executor, nor get the legacy unless he do marry. For though he need not so much as crave the consent of the other, seeing that part of the con-

3 Atk. 645. *Booth v. Booth*, 4 Ves. 399, but which presumption is not afforded by a direction for maintenance, out of the interest, *Pulsford v. Hunter*, 3 Bro. Ch. Ca. 419. *Leake v. Robinson*, 3 Merivale's Rep. 386.

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dition is unlawful, yet he must marry e'er he can pretend any title to the executorship or legacy, seeing that part of the condition is not unlawful."

This differs from 1 Salk. 170. for there the condition did not become impossible by the act of God, for it must be presumed that she might have married during her lifetime.

As I think this is the legal construction of the will so it appears to me to be perfectly agreeable to the real, actual intention of the testator. His meaning plainly was this :—

That if his daughter married she should have 200*l.* for her portion, to be taken out of his leasehold estate ; and a maintenance of 12*l.* *per annum*, by way of annuity, out of it in the mean time ; but that if she did not marry at all, the 200*l.* should not be taken out of his leasehold estate to the prejudice of his sons ; but should sink into it for their benefit ; and that she should have the 12*l.* *per* year for her maintenance during her living single.

The consequence of this is, that the bill must be dismissed : but I will give no costs.

The ATTORNEY-GENERAL at the Relation of JOHN BREWRIDGE and Others, on behalf of themselves and all the rest of the Inhabitants of the Hamlet of *Sandford*, in the Parish of *Crediton*, in the County of *Devon* .

Plaintiffs; (1)

and

Sir JOHN DAVY, Bart. and Others, being the Twelve Governors of the Hereditaments and Goods of the Church of *Crediton*, in their private capacity, and the said Twelve Governors in their corporate capacity, and the BISHOP of EXETER, and JAMES LONG, and THEOPHILUS BLACKHALL, Clerks

Defendants.

July 25th, 1737.

KING EDWARD the Sixth, by letters patent, dated the 2nd of April, in the first year of his reign, granted to the inhabitants of *Crediton*, that thenceforth there should for ever be within the said parish, of the inhabitants thereof twelve governors of the hereditaments and goods of the said church, whereof three were always to be inhabitants of the hamlet of *Sandford*, which is part of the same parish; and that such twelve governors should be one body incorporated for ever by the name of the twelve governors of the hereditaments and goods of the church of *Crediton*, otherwise *Kir-ton*; and the parish church of *Crediton*, *St. Swythins*' chapel, in *Sandford*, and other premises; and the advowson and right of patronage of the vicarage of *Crediton* were

By letters patent three of twelve governors, together with the assent of the major part of the inhabitants of *Sandford* were empowered to nominate and appoint a chaplain for the village or hamlet of *Sandford*, and with the like assent to remove him on reasonable cause.

One of the three governors with the assent of the major part of the inhabitants appointed one person; and the other two of the three governors, with the assent of a smaller number of the inhabitants, appointed another person to be chaplain—both appointments were held invalid:—but where a chaplain was appointed by two of the three governors, with the approbation of the major part of the inhabitants, but the other of the three governors refused to join in the appointment,—such appointment was held valid.

(1) The first part of this case is taken from Lord *Hardwicke's* Notebook; the second part of the case where it came on to be heard, on the 27th of July, 1741, from a Manuscript Report of Mr. *Forrester's*.

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was an election by the inhabitants, and these three governors were to be of the quorum. That if a charter be granted to a mayor and aldermen, *quorum* (mayor) *unum esse volumus* the assent of the mayor is not necessary. That if the construction contended for on the other side should prevail, the hamlet might for ever continue without a chaplain, as no provision is made against the event of the inhabitants dissenting from the nomination of the governors. That it is the assent which gives validity to the act. The governors have indeed the presentation, but the inhabitants are entitled to the nomination. The governors can only nominate such person as the inhabitants assent to.

Mr. Brown, Mr. Pauncefort, and Mr. Hamilton for the governors.

If there be a bare authority vested in the governors, all must concur, 1 Salk. 476. Case of *New College Oxford*, Dyer, 247. This alone would be sufficient to invalidate Mr. Long's election. The power of removing is granted in the same manner as the power of appointing. The word assent cannot be construed to import a joining in the original act. *Attorney-General v. The Inhabitants of Ottery St. Mary's*, Hob. 308. This resembles the case of a bishop authorised to grant leases with the assent of the dean and chapter, 14 H. 6. 16, 17. In *The Attorney-General v. Gilbert*, 31 May, 1 Geo. 2. in Chancery, the testator gave his estate to six trustees and executors, and directed that his executors, with the consent of the inhabitants, should choose a minister to officiate when the parson should be at another place. The court declared that the right of election was in the trustees, and directed them to meet and agree upon a proper person; and that they should give public notice in the church for the inhabitants to elect, &c.

July 25, 1737.

The LORD CHANCELLOR.—The first thing to be considered is, what is the true construction of this charter? Secondly, What will be the consequence of such construction?

As to the first, I am of opinion, that the right of nomination and appointment is given to the three governors; and that the inhabitants, or the major part of them, have a power of assenting to, or dissenting from it. That this is the true construction, appears not only from the words of the particular clause, but from the whole tenor of the charter. By the clause itself, these three of the twelve governors, together with the assent of the major part of the inhabitants, are to

nominate and appoint. Here are two distinct acts. The nomination is given to one, the approbation to the other. The words must receive the same construction which is given to them in similar cases. Officers are frequently directed to be elected with the approbation of the Crown. Bishops are authorised to grant leases with the assent of the Chapter. By other clauses in the charter, the church and chapel are granted to the twelve governors; and the right of nominating the vicar is expressly granted to the twelve governors. The right of nominating the chaplain is taken out of the twelve, and restrained to the three governors, for the hamlet of *Sandford*; but the act to be done is the same, excepting that the assent of the inhabitants is required. Upon the construction contended for, there would be no reason for naming these three governors, and severing them from the twelve.

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It would, indeed, be a strange construction, that because these three governors are to do an act with the assent of the major part of the inhabitants, *ergo*, the major part of the inhabitants are to do the very same act without them. The intent of the Crown was to give to the one a negative upon the other. The power of removal is granted under the same form of expression; and it would be monstrous if the parishioners were to have that power without the concurrence of the three governors. The case cited is in point, but the present appears to me to be stronger.

It only remains to be considered, what will be the consequence of this construction? It may be made a matter of doubt, whether the two governors can bind the other; but it is not material to decide that point at present.

Cases have been put, in which this construction might defeat the objects of the charter. These events are not to be presumed, and certain inconvenience would arise from the other construction, which would take away all right and authority from the three governors; but whatever inconveniences may arise, I cannot vary the charter. The parties must take it, subject to the terms imposed upon them by the Crown. There may, however, be some objections to the form of the decree.

His Lordship declared, that the defendant *Blackhall* is not duly nominated or appointed chaplain of the chapel of *Sandford*, and that the defendant *Long* is not likewise duly nominated or appointed chaplain thereof, and therefore doth order and decree, that the defendants, *Sir J. Davy, Robert Snow,*

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and *Robert Read*, being the three governors on the part of the vill or hamlet of *Sandford*, do forthwith proceed to nominate a chaplain to perform divine service in the said chapel of *Sandford*, and do thereupon give public notice in writing to the inhabitants of the said vill or hamlet, by affixing such notice on the door of the said chapel, before the first Sunday after such nomination whereon divine service shall be performed in the said chapel as aforesaid, in order that they, or the major part of them, who shall be present at such meeting, may assent to or dissent from such nomination; and in case they, or the major part of them, shall assent thereto, the person so nominated is to be admitted to hold and enjoy the said office according to the charter; but in case the said inhabitants, or the major part of them, shall not assent to such nomination, so to be made, then either party is to be at liberty to apply to the Court; and his Lordship declared, that the three defendants, the governors, have no right to vote as inhabitants, in giving such assent or dissent.(1)

In consequence of this decision a new election took place, at which *Mr. Barker* was nominated by two of the three governors, and was approved of by a majority of the inhabitants. The other of the three governors refused to join in the nomination of *Mr. Barker*.

Mr. Barker and the two governors presented a petition, praying that he might be declared duly elected, and might enjoy his office, and have the salary paid him.

This petition coming on to be heard on the 27th of July, 1741, *Mr. Attorney-General* and *Mr. Murray* were heard against the petition.

In corporations the majority will conclude the rest, and what is done by them, is the act of the whole body; but here these three governors are not a separate corporate body, but have a special power by the charter delegated to them to do this act, and the words of it are express, *Illi tres, &c.* These three are expressly directed to choose. If two only concur, how can it be said that the three choose? Where powers are given to particular persons all must concur, as in the case of powers of attorney, and such powers will not survive. So it was, where executors had a power by will to sell lands, till the statute of Hen. 8th. The question then is, whether these three can be considered as a common council of the

(1) Reg. Lib. A. 1736. fo. 671.

corporation. Where the charter intended that a majority should do the act, it has expressly said so, as in the election of new governors. Nothing is here to be done by the corporation. This act is not to be done under their seal, nor is any report to be made to them. Therefore, it is not like a corporate act to be done by a select body, but the whole power is in them, and the inhabitants are no part of the corporation, but a distinct power is given to them; though the governors are described as governors, yet notwithstanding that description, the power may be given to them in their private capacity.

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LORD CHANCELLOR.—This case must be determined on the rules of law in the construction of the charters of the Crown, and in the same manner as if the question arose on an information or mandamus.

The charter incorporates the twelve governors, and the rest of it consists in the distribution of particular powers to the members of the corporation; whereas in charters for public or private government powers are given to particular parts of the body. They vest in respect of interest in the whole body, and in point of exercise only in the part of the corporation to whom the power is given, as in common council, &c. Of this kind is the power in question. It is not every act of a corporation which need be under the seal of the corporation. Elections never are, nor need they by law be so.

I think that this election is a corporate act, and that the three governors make the election as a select number of the corporation, appointed for that purpose.

By the rules of law, where corporate acts are to be done by the whole body, or by a select number of it, it is not necessary all should concur.

This is a rule of law, and no words are required to give this power to the majority, where an act is directed to be done by them, or a major part. The true construction is, that the words do not respect the doing the act itself, but respect the meeting, and give a power upon a proper summons to the whole body, for the major part to meet, for the purpose of doing such acts. In such cases, if a major part of the body meet a major part of those thus met, though less than a major part of the whole may do the act; but without such a clause all must meet, and then the major part met conclude the whole body.

In the present case all met, and the major part concur.

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I think, therefore, that the majority present must have the power to nominate, and this *ut res magis valeat quam pereat*.

This is not to be compared to powers delegated to private persons, because in those cases the acts to be done are not corporate acts, and the powers do not vest in them in a body, but are to be exercised by them individually.

It is probable that the number three was selected that there might always be a majority, and a construction giving a negative to a single governor, might be attended with great inconvenience.

His Lordship declared, that the petitioner *Barker* was duly nominated and appointed to be chaplain of the said vill of *Sandford*, and that he should hold and enjoy the place, and that the corporation should pay him the arrears, and the salary for the future.(1)

(1) Reg. Lib. A. 1740. fo. 594.

MEDLEY v. PEARCE.(1)

July 28th, 1737.

LORD CHANCELLOR.—The course of the Court, according to strict rule, is, that an order is necessary for the examination of a witness, to matters of account, before the Master, who had been examined to other facts before the hearing, but the practice is *contrâ*.

(1) This case is taken from Lord *Hardwicke's* Note-book.

ANONYMOUS.(1)

July 30th, 1737.

To a bill by an executor for an account and discovery of moneys due to the testator, the defendant pleaded that the testator was a bankrupt, and that the assignees under the commission were not made parties to the suit. It was insisted that this plea was bad, because it was not averred that the commission was in force, and that in fact it had been superseded.

superseded by the consent of the creditors, the property remains in the assignees until a re-assignment; but if it is superseded for irregularity it is void, *ab initio*, and the assignment made is void.

Plea of bankruptcy allowed though it did not aver that the commission was in force.(2) If a commission abates by the death of the King, or is

LORD CHANCELLOR.—Where a commission has been regularly issued, and an assignment made; that vests the property of the bankrupt's goods in the assignees, and if the commission abates by the death of the King, or is superseded by consent of the creditors, yet the property remains in the assignees until a re-assignment is made. But if it be superseded for irregularity in the commission, the whole becomes void, *ab initio*, and the assignment made in pursuance of it is therefore void likewise, but I cannot intend that such a supersedeas has taken place.

Plea allowed.

(1) The report of this case is taken from Mr. *Forrester's* manuscript. It is not to be found in Lord *Hardwicke's* Note-book.

(2) Plea of bankruptcy to a bill by an heir at law against a devisee, must aver distinctly, and in succession, the facts upon which the bankruptcy rests. Not sufficient for the devisee to aver,

by his plea, that a commission of bankruptcy was issued against the plaintiff, under which he was afterwards duly found and declared a bankrupt, and that his estates and effects were thereupon duly assigned to the assignees. *Carleton v. Sir W. Leighton*, 3 Mer. Rep. 667.

SHERIFF *v.* SPARKS. (1)

July 30th, 1737.

A mortgagor cannot be finally foreclosed, until an order absolute be obtained for that purpose. (2)

THIS was a bill to redeem to which the defendant pleaded the usual order obtained in a former suit by the mortgagee to foreclose that the mortgagor should stand foreclosed unless the money was paid by a certain day.

LORD CHANCELLOR.—A mortgagor cannot be finally foreclosed until an order absolute is obtained for that purpose. It was the ancient practice that on a decretal order to stand foreclosed, unless the money was paid by a certain day, that after that day the mortgagor was of course absolutely foreclosed, but now that order is in the nature of an order to shew cause, and must be made absolute on an affidavit that the money was not paid at the day, by another order that the mortgagor shall stand absolutely foreclosed.

Plea overruled. And the usual account directed of what was due for principal and interest, &c. (3)

(1) The report of this case is taken from Mr. *Forrester's* manuscript. It is not to be found in Lord *Hardwicke's* Note-book.

(2) So *Senhouse v. Earl*, 2 Ves. 450. and see *Thompson v. Grant*, 4 Madd. Rep. 438.

(3) Reg. Lib. B. 1737. fo. 334.

BENNETT *v.* WALKER and COLEBROOK. (1)

August 1st, 1737.

Where a purchaser without notice has conveyed to a purchaser with notice, the latter purchaser may plead that the first purchase was without notice. (2)

THIS was a bill for the discovery of defendants' title to the advowson of *Lymington*. The defendant *Walker* pleaded that he purchased from the defendant *Colebrook*, and that *Colebrook* was a purchaser without notice, but admitted that

(1) This case is taken from Lord *Hardwicke's* Note-book

(2) So *Brandlyn v. Ord* post. *Low-*

ther v. Carlton, 2 Atk. 242. *Macqueen v. Farquhar*, 11 Ves. 478.

he had himself notice of the claim before the conveyance was completed.

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Mr. *Floyer*, Mr. *Hamilton*, and Mr. *Clarke* in support of the plea, cited *Lowther v. Carleton*, coram *Talbot*, 11th April 1736, and 2 Atk. 242. *Harrison v. Forth*, Prec. Ch. 51. In which Lord *Somers* held that a purchaser with notice might avail himself of a prior purchaser without notice, for otherwise an innocent purchaser might be deprived of the benefit of ever selling his estate.

LORD CHANCELLOR.—Where a purchaser without notice has conveyed to a purchaser with notice, the latter purchaser may plead that the first purchase was without notice.

The plea was ordered to stand for an answer, with liberty to except, saving the benefit to the hearing of the cause.

HUGGINS v. ALEXANDER and Another. (1)

October 13th, 1737.

LORD CHANCELLOR.—A bill was brought against an infant and others. The infant appeared and was in contempt for want of an answer to an attachment which was issued, and returnable the first day of Michaelmas Term. Upon producing the attachment, Mr. *Floyer* moved for a messenger to bring the infant into Court, of which I doubted, the attachment not being served, nor the return out. Mr. *Scott* the register could not take upon himself to say how the practice was, so I ordered precedents to be searched, and the next day Mr. *Edwards* the other register certified the practice to be so, for that the attachment is not to be served on the infant, but the infant is to be brought into Court to have a guardian assigned, and it is in his favour. He said it is done on issuing the attachment, and that the constant suggestion is that the infant is in contempt to an attachment, of which he produced a precedent.

An infant being in contempt to an attachment for want of an answer upon production of the attachment, a messenger ordered to bring the infant into court, the attachment not having been served, or the return out.

I ordered a messenger accordingly.

(1) This case is taken from *Lord Hardwicke's Note-book*.

STYLES v. ATTORNEY GENERAL. (1)

October 19, 1737.

A judgment creditor not entitled to interest under a decree in this Court. (2)

IN Hilary Term 1722, a bill was brought by the Duke of *Wharton*'s judgment creditors, and in August 1723, a decree was made for a sale of the trust estates, and that the money arising therefrom should be paid to the creditors according to their priority.

Upon the Master's Report, a question arose whether a judgment creditor should have interest allowed by way of damages for a debt on a judgment.

The original debt was by bond with a penalty, and in Easter Term 1723, judgment was given on a *mutuatus* for the real debt.

Mr. *Clarke*, in support of the claim. The Duke of *Wharton*'s estate being vested in trustees, the creditors could get at it only through this court. A judgment creditor delayed by the injunction of this Court has interest allowed in damages, and cited Cro. El. 151. 1 Salk. 208. *Holdipp v. Otway*, 2 Saund. 106. 1 Sid. 442., and *Turner v. Main*, Pasch. 8 Anne, in Chancery, where interest was given in damages on a bill obligatory, by Lord *Cowper*. *Harvey v. Parker*, 9 May 1715, and cases in the House of Lords, 1726, and 3 Bro. P. C. 187. *Maxwell v. Wettenhall*, 2 P. Wms. 27.

Mr. *Browne* for the trustees of the late Duke of *Wharton*, contended, that there was no instance in which the estate had been affected with more than the legal debt, nor where interest had been allowed beyond the judgment, where the creditor was plaintiff, though there possibly might, where the debtor was plaintiff and came into this Court to be relieved.

Oct. 19, 1737.

LORD CHANCELLOR.—The assignee of the judgment is not entitled to any interest under the decree in this cause, because such interest, although possibly it might have been turned into a debt by judgment, is not now a debt by judgment so as to create a present lien on the real estates.

(1) This case is taken from Lord *Hardwicke's* Note-book.

(2) So *Creuze v. Hunter*, per Lord

Rosslyn, 2 Ves. jun. 157.; and see the cases there cited.

Ex parte the Committee of LORD BRADFORD. (1)

—

22nd October, 1737.

LORD Bradford being tenant for life, with a power to grant leases, and being a lunatic, his committees presented this petition that the Court might authorise and direct them to execute this power.

A lunatic being tenant for life, with a power to grant leases, the Chancellor cannot authorise the committees to execute this power. (2)

Mr. Browne and **Mr. Clarke** in support of the petition, cited *Lady Grosvenor's* case, where building leases were ordered to be executed upon a petition on behalf of the lunatic's estate. Acts done by a feme covert in execution of a power are good, 1 Co. Litt. 112 b. *Daniel v. Upley*, 1 Jones, 137. Noy 80. *Tomlinson v. Dighton*, 10 Ann. 1 Salk. 239. 1 P. Wms. 149. *Rich v. Beaumont*, 3 Bro. P. C. 308. So, infants may execute powers, *Artherton v. Coverley*, Lord King, Lev. 47. 1 Inst. 22.

LORD CHANCELLOR.—None of the precedents come up to this case. There is no ground to say that the committee can execute this power. It is to take effect out of another's estate, and must therefore be strictly pursued, but the leases now proposed to be made, would not be warranted by the power.

Suppose a lunatic before his lunacy had made a voluntary settlement with a power of revocation; no one can think that the committee could execute that power. Or suppose there was a power to charge an estate with a sum of money, the committee could not do it.

Another question has been made whether the lunatic himself can execute this power, and for this purpose, the cases of feme coverts and infants have been cited. But the coverture of a woman is only a civil incapacity, and a feme covert cannot execute a power coupled with an interest, though she may execute a bare power. A power that can be executed by an infant, must be appointed to be executed by him whilst an infant.

(1) The report of this case is taken from *Mr. Forrester's* manuscript. It is not to be found in *Lord Hardwicke's* Note-book.

(2) But now by the 43 G. 3. c. 75. s. 3., the committee may execute such a power under the authority of the Great Seal.

Ex parte
BRADFORD.

In this case there are several discretionary acts to be done. It is not the case of an act merely ministerial.

The cases cited out of Lord *Coke*, are of civil incapacities. The case in *Lutwich* is not in support of this application, but against it, for it was there held that neither a lunatic Lord nor his committee could grant copies, but that his steward might, that being part of his office.

The strongest case is that of Lady *Grosvenor*, but in that case there was no power to be executed. She was owner of the fee, and all persons interested joined in the petition. Besides I have some recollection that there was an Act of Parliament afterwards obtained.

I would not do this if consented to by all parties.
Petition dismissed.

HANS STANLEY, an Infant Plaintiff;

and

SARAH STANLEY, Widow of GEORGE STANLEY, Esq., and Mother of the Plaintiff, ELIZABETH, ANN, and SARAH STANLEY, her Infant Daughters; Sir H. SLOANE, LORD CADOGAN, and WILLIAM ROBERTS, Trustees in the Marriage Articles; EDWARD HOOPER, Esq., WILLIAM SLOANE, Esq., Trustees named in the Will of said GEORGE STANLEY; PHILLIPPA STANLEY, Widow and Administratrix of HOBY STANLEY, Clerk, Executor of the said GEORGE STANLEY, his Brother, Deceased

Defendants.(1)

IN THE CROSS-CAUSE.

ELIZABETH, ANN, and SARAH STANLEY

Plaintiffs;

and

HANS STANLEY, Infant, and all the other Defendants in the Original Cause

Defendants.

October 25th, 1737.

By the articles made previous to the marriage of *George Stanley* deceased, and the defendant *Sarah Stanley*, then *Sarah Sloane*, dated 27th January 1719, *William Stanley*, the father of *George Stanley*, covenanted to pay 12,000*l.*, and Sir *Hans Sloane*, the father of *Sarah*, covenanted to pay conveyed to trustees to the use of the husband for life, then as to so much as should amount to 800*l.* per annum to the use of his wife for her jointure, remainder to trustees for 500 years, remainder to the first and other sons in tail male, with a power to the husband of disposing by will or deed of the surplus of the said lands above the said 800*l.* per annum amongst the younger children, remainder to the husband in fee, and the trusts of the term were, that in case there should be issue male of the marriage who should enjoy the inheritance of the premises so to be purchased, 8,000*l.* was to be raised and paid for younger children at twenty-one or marriage, share and share alike, with interest for maintenance until the principal was payable; the father dies; portions not payable till the mother's death. The sense of the words *enjoy the inheritance* being, *enjoy in possession*. And the husband by his will having mentioned that the provision for the younger children by the marriage articles, was not to take effect till after his wife's death, was held to be further evidence of the husband's intent, where the intent upon the articles was doubtful and ambiguous.

1 Atk. 549.
By marriage articles, 20,000*l.* was agreed to be laid out in the purchase of lands, to be

(1) This case is taken from a manuscript of Mr. *Forrester's* which corresponds with the same case reported in Lord *Hardwicke's* Note-book.

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8,000*l.*, which two sums of 12,000*l.* and 8,000*l.* it was agreed should be laid out in the purchase of lands, and that such lands, when purchased, should be settled and conveyed to the trustees therein named, to the use of *George Stanley* for life, then as to so much thereof as should amount to 800*l.* *per annum* to the use of his wife for her jointure, remainder to trustees for 500 years, upon certain trusts thereafter mentioned, remainder to the first and every other son of the marriage in tail male, with a power to the husband of disposing by will or deed of the surplus of the said lands above the 800*l.* *per annum* amongst the younger children of the marriage, as he should think fit, over and above what was thereby provided for such younger children, and for want of issue male, and after the determination of the term of 500 years, to the use of *George Stanley* in fee. The trust of the term of 500 years was declared to be for raising portions for younger children; and that in case there should be *issue male of the marriage, who should enjoy the inheritance of the premises* so to be purchased and settled, and one or more son or sons, daughter or daughters of the said marriage, then the sum of 8,000*l.* should be raised and paid for the portions and maintenance of such younger son or sons, daughter or daughters, to be equally divided amongst them, share and share alike, and payable at their respective days of marriage, or age of twenty-one years, which should first happen; and in case of the decease of any of them before their marriage or attainment of age, the parts or shares of such child so dying, to go to the survivors equally to be divided, and the interest or produce of each such younger sons' or daughters' respective parts or shares of the said 8,000*l.* in the mean time, and until the principal becomes payable, was to go and be for their respective maintenance and education. And it was declared that the said sum of 8,000*l.* for the said provision of younger sons and daughters, was to be raised by the said trustees out of the rents, issues, and profits, of the premises, or by lease or leases, mortgage or sale of a sufficient part thereof, with such usual clauses and powers as are made in settlements for that purpose; and in case there should be no such younger son or sons, daughter or daughters, or that they should die before their respective portions should become payable then the said sum of 8,000*l.* appointed to be raised for their portions was not to be raised, and the term of 500 years was to cease and be void. There were issue of the marriage, one son and three daughters.

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STANLEY.

Mr. *George Stanley*, by his will, dated 9th December, 1731, devised several parts of his real estate to trustees for the term of 500 years, upon trust, by and out of the rents, issues, and profits, or by demise, mortgage, or sale, of all or any part of the premises, for the whole or any part of the term, or by any other means they should think fit to raise the sum of 4,000*l.* for his three daughters as an addition to the fortune provided for them by his marriage articles to be equally divided amongst them at their respective ages of twenty-one, or days of marriage, which should first happen; and in case he should leave only one daughter, he appointed that the sum of 4,000*l.* should be paid to her at twenty-one or marriage, declaring that this was not to be an augmentation; but upon a discharge given of the sum of 4,000*l.* to the trustees of his marriage articles as half of the provision made by the said articles for younger children, after the decease of his wife, and upon further trust, that in the mean time and until such daughter or daughters should be respectively entitled to the said sum, they his trustees should out of the rents, issues, and profits of the said premises, from time to time raise the several sums of 50*l.* *per annum* for the respective maintenance and education of his daughters, and he declared his will to be that as soon as the said sum of 4,000*l.*, and the annual sum of 50*l.* a-piece for maintenance and education should be fully answered that the said term should cease; and he gave the freehold and inheritance of the premises so devised for the term of 500 years to his son *Hans Stanley*, in fee, to whom he gave the residue of his personal estate, and appointed his brother, *Hoby Stanley*, sole executor thereof.

Mr. *Stanley* died in 1733, leaving his wife, the defendant *Sarah Stanley*, the plaintiff his only son, and the defendants, his three daughters, all infants.

The original bill was brought for carrying into execution the marriage articles made on the marriage of *George Stanley*, Esq. with the defendant, *Sarah Stanley*, then *Sarah Sloane*, for an account of the estate of *Wm. Stanley* and *George Stanley*, plaintiff's grandfather and father, and praying directions for the interest of the infant and estate. The principal question was, whether the 8,000*l.* provided as a portion for the younger children should be raised presently in the mother's lifetime, or not until the trust term of 500 years should be actually come into possession by the death of Mrs. *Stanley*.

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The cross-bill was brought for the purpose of having the 8,000*l.* raised and paid to the younger children, and interest from the death of their father.

Mr. *Chute* and Mr. *Fazakerley*, for the plaintiffs.

There are three things insisted on in behalf of the infant daughters. 1st, That the 8,000*l.* ought to be raised at twenty-one, or marriage, during the life of the mother. 2nd, That they are entitled to interest immediately from the death of their father. 3rd, That the surplus profits over and above the 800*l. per annum*, ought to go to them, because the father might appoint among his younger children.

First, As to raising the portions, the cases have generally been on settlements *executed*; here it depends on articles executory, which are to be expounded by this Court, and in the construction of which greater latitude is allowed than in that of a strict settlement executed, so that words in articles which in a settlement would create an estate tail have been construed to give an estate for life to the father, with remainders over. The term itself is not to commence till after the death of the mother; for there are no words to be found which enable the trustees to raise the portions in her lifetime, any more than *in that of the father*, and there is certainly no colour for supposing that had a bill been brought during *his* lifetime, to raise the maintenance of the daughters immediately, that it could have been supported.

The trustees are empowered to raise the portions by rents and profits, or sale, or by mortgage; it is an alternative, and it is left to their discretion in which way the portions shall be raised, consequently they must have the power of doing it either way. Such a construction as is contended for by the other side, would tend entirely to strip the son of his estate. There is something peculiar in the description of the trust of the term which limits the raising of the portions to the case of there being *issue-male, who shall enjoy the inheritance of the premises*; a clause which can reasonably be construed to mean nothing less than the *possession* of the inheritance, *Evelyn v. Evelyn*, 2 P.Wms. 659., and *Brome v. Berkley*, 1 Eq. Ab. 340. 2 P.Wms. 484.

Secondly, As to the interest and maintenance, these are to arise out of the rents and profits, when in the hands of the trustees, and not by sale of the inheritance, and it was intended that the parents should maintain the children in the mean time; besides, Mr. *Stanley* by his will, has made a provision of 50*l.* a-piece for the maintenance of his daughters.

Thirdly, With respect to the surplus over and above the 800*l.*, no question can arise at present, because there is now no surplus.

Mr. *Attorney-General* and Mr. *Clive*, for the defendants, the daughters.

There are two questions,—1st, Whether the daughters are entitled to have the portions raised out of the provisional term; 2nd, Whether they are entitled to have maintenance, and interest raised in the mean time.

As to the first.—First, Consider it as if a settlement was actually made; it is the plain intention that the daughters should have the provision when they attained their age of twenty-one years, or were married. The question depends on this, whether the contingency on which the trusts of the term are to take effect has happened; it has been objected that the contingency rests on this, *that there should be a son who should enjoy the inheritance of the estate*; which it is contended means *that there should be a son in possession*, which there has not yet been; to this it may be answered, that a person may be said to *enjoy* an estate in reversion or remainder, for though he cannot receive the profits; yet he may dispose of his reversionary interest for its value. The words cannot be intended to mean, being in the actual receipt of the profits; for if that had been meant, the sentence would have been framed thus, *who shall be in the possession*. It has been further objected, that the plaintiff had the reversionary estate in the lifetime of his father; that upon our principles the daughters would have had the same right to have enforced their claim during their father's lifetime: but that is no valid objection, for most of the cases alluded to, have come on in the lifetime of the father, and it is certain that this Court has never laid a stress on the convenience or inconvenience which might accrue to the remainder-man. It is also argued, that our construction would exhaust the whole estate of the son's, but such may have been the intention of the parties, for it is to be observed, that this is not a settlement of the family estates, but the disposition of a sum of money to be turned into land, and that it was apparently more the intention to provide for younger children out of this fund, than the eldest son, whose establishment was referred to the family estate.

Secondly, It is to be considered whether any difference arises by reason of these being *executory* articles.

And upon this point, it cannot be reasonably insisted that

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there is any real difference, for both instruments are to be construed according to the intention of the parties; where articles are framed for settling lands upon the father, and then upon his issue; the reason for varying them is, that otherwise the object of the contract which is to provide for the children would be defeated. Articles entered into upon a valuable consideration, are considered in equity, as if carried into execution, and are held to have all the same consequences.

As to the *second* point respecting the interest and maintenance, if interest had not been given by the instrument, there would have been reason to insist that none should be given till the time of payment of the principal was arrived; but here it is expressly given, and then it must come out of the reversionary fund.

A *third* point arises on the will of *George Stanley*, and as to this the *150l. per annum*, for the maintenance of the three daughters *cannot* be raised out of the annual profits of the particular lands charged by the will, for their value does not exceed *100l. per annum*, but it is clearly the intention that *150l.* should be annually paid; and the term is not to cease till it is paid; it must therefore be raised as it can, a devise of the rents and profits is a devise of the lands itself. So a trust to raise out of rents and profits, includes the power of mortgage or sale, *Ivy v. Gilbert*, Pre. in Ch. 583. 2 P.Wms. 13. It appears too that there is a vast quantity of timber on the estate, this is to be considered as part of the *profits*, and it is impossible that the trust can be performed in any other way than by resorting in some degree to the inheritance. In *Brome v. Berkley*, there was a clear intention to postpone the disposal of the term till it actually came into possession. *Hellier v. Jones*, 1 Eq. Ca. Ab. 337. *Davy v. Hooper*, 2 Vern. 665., and 1 Eq. Ab. 336, were likewise cited.

Oct. 28, 1737.

LORD CHANCELLOR.—The question is, whether the daughters are entitled to have their portions raised immediately out of the term; and are to have the maintenance until the money can be raised, or whether they are to wait until their mother's death, which is *vexata quæstio*, it being difficult to reconcile the various resolutions upon this head, without entering into very minute circumstances. But however the latter authorities have generally been against raising portions in the life of the father or mother, unless the words

The latter authorities have generally been against raising portions in the life of the father or mother: unless the words were so express as not to admit of any other construction.

unless the words were so express as not to admit of any other construction.

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were so express as not to admit of any other construction, and that because the raising portions in the lifetime of the parent, tends to an absolute destruction of the inheritance: here the doubt is, whether the contingency upon which the trust of the term is to take effect, hath yet happened; for as to the term itself, that is not contingent, but vested in the trustees by the father's leaving younger children, and I am of opinion, that the contingency upon which the trust is to take effect, hath not yet happened; for it is not sufficient that there should be issue-male, and likewise other children; but that issue-male must *enjoy the inheritance*, which must be understood enjoying it in possession, for otherwise the effect of the words *enjoy the inheritance*, if taken to mean an enjoyment in *reversion*, would be absolutely annulled; the issue-male being the very moment after his birth entitled to the inheritance in remainder, after the particularestate is spent.

The portions are to be paid at twenty-one or marriage, and the interest to be for their maintenance and education; but that must be understood from the time only that their portions became payable, since otherwise the younger children might as soon as they were born in their father's lifetime, have brought a bill for maintenance, which it is absurd to suppose could ever have been meant by the parties. It must therefore be understood *an actual possession*, it being a very metaphysical notion of an enjoyment that a man enjoys an estate because he hath a reversion or remainder after the estate for life is spent, during the continuance of which he doth not receive one shilling of the profits. The party's intent is further manifested by an expression in Mr. Stanley's will, wherein he mentions the provision made by his marriage articles for his younger children *after his wife's death*: now although these words could not take away the daughters' right, if any they had; yet that right being ambiguous and doubtful, they evince by this latter act of his, what his intent was in the former; in the present case there are certain words sufficient to postpone the raising the portions until the mother's death; in that of *Brome v. Berkley*, 1 Eq. Ca. Ab. 340., and 2 P.Wms. 484., the term was for raising portions for daughters, to be paid at twenty-one or marriage, which should first happen, by and out of the rents and profits, or by mortgage and sale, as the trustees should think fit, and in the mean time and until the portions should become payable, the trustees were to raise 100*l. per annum* for their maintenance. The father

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died, and the daughter married, having attained her age of twenty-one; but because the maintenance was to precede the portion, and the first payment of that maintenance was to commence only upon the first feast after the term was come into the trustees' possession, which could not be until the mother's death; for that reason, hard as the young lady's case might appear to be, it was held in this Court, and afterwards in the House of Lords, that the portion should not be raised till the mother's death. So in *Butler and Duncomb's* case, 2 Vern. 760., and 1 P. Wms. 448. Though by consent of all parties, a medium was found out to satisfy the husband and wife's demands. Now the present case seems to bear a great likeness to that of *Brome v. Berkley*, and to that of *Corbet v. Maidwell*, 1 Eq. Ca. Ab. 337, pl. 5.

The Lord Cowper said, that he would not go a step further than the resolution in *Greaves v. Mattison*, Jones 201., and that had it been *res integra* before him, he would not have gone so far as the judgment does in that case; (1) besides

(1) In *Gerrard v. Gerrard*, 2 Vern. 459., an estate was settled upon the husband for life, remainder to the wife for life, remainder to trustees for a term of years, to raise a portion for a daughter of the marriage to be paid at twenty-one or marriage, which should first happen *after the decease of the father and mother*. The daughter's portion was decreed to be raised in the lifetime of the mother; and see *Greaves v. Mattison*, Jones 201. *Staniforth v. Staniforth*, 2 Vern. 460. *Sandys v. Sandys*, 1 P. Wms. 707. *Hebblethwaite v. Cartwright*, Cases Temp. Talbot 31. *Smith v. Evans*, Ambl. Rep. 633. *Hall v. Carter*, 2 Atk. 354.

The cases of *Gerrard v. Gerrard*, and *Greaves v. Mattison*, have been considered by Lord Cowper, Lord Macclesfield, Lord Hardwicke, and Lord Alvanley, as extraordinary determinations, see *Butler v. Duncombe*, 1 P. Wms. 452. *Stevens v. Dithicke*, 3 Atk. 41. *Clinton v. Seymour*, 4 Ves. 440. And in relation to those cases, and in order to avoid the inconveniences which have resulted from them, the destruction of the inheritance, and the

disobedience of children, judges have been eager to lay hold of words by which to distinguish subsequent cases; as where the portion was to be paid at twenty-one or marriage, but maintenance was to commence only when the term came *into possession*; which could not be till after the mother's death, *Brome v. Berkley*, 2 P. Wms. 484.

So where it was to be paid at similar times, but one of the contingencies was, that the daughter should be unprovided for at the father's death, *Corbet v. Maidwell*, 2 Vern. 640., it was decreed that the portion should not be raised in the one case in the mother's, in the other case, in the father's lifetime. See likewise *Reresby v. Newland*, 2 P. Wms. 94. *Worsley v. Earl Granville*, 2 Ves. 332. Lord Eldon in *Codrington v. Foley*, 6 Ves. 380., says, "The proper rule is what Lord Talbot states; that the raising or not raising must depend upon the particular penning of the trust, and the intention of the instrument. I do not think the Court ought to be eager to lay hold of circumstances. The Court ought to hold an equal mind whilst construing

the widow is by the articles to have 800*l.* *per annum*, clear of all taxes; but if these portions are to be raised in the mother's lifetime, there would be nothing left for the issue-male; and the intent of the party as to him, that he shall have and enjoy the estate after the mother's death would be entirely frustrated.

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His Lordship declared, that the three daughters, plaintiffs in the cross-cause, were not entitled to have either their portions of 8,000*l.*, or any interest or maintenance in respect thereof raised out of the reversionary term of 500 years during the life of their mother. (2)

the instrument, and I cannot agree with what is said in *Stanley v. Stanley*, that very small grounds are sufficient. If they are sufficient to denote the intention, they are not small grounds; if they are not sufficient to denote the in-

tention, the Court does not act according to its duty, by treating them as sufficient, thereby disappointing the true intention of the instrument."

(2) Reg. Lib. B. 1737. fol. 120.

LASSELLS RAYMOND IRONMONGER, } Plaintiff; (1)
an Infant }
and
EDWARD LASSELLS, CHRISTOPHER }
LETHIVALLIER, Executor and Trustee } Defendants.
of the Will of EDWARD LASSELLS }

October 26, 1737.

EDWARD LASSELLS, by his will, dated 20 June, 1726, devised as follows :—

Where a testator by his will gives certain estates to trustees

upon trust to pay the rents and profits towards the payment of his debts and legacies, until the same shall come to his son *Thomas*, and then gives the said estates to his son *Thomas* when he attains twenty-six; but in case his son *Thomas* should die before twenty-six, then he gives the plaintiff 1,000*l.*, and gives all the estates given to *Thomas* to his son *Edward*. *Thomas* having died before twenty-six, it was held, that in case the personal estate was deficient, the rents and profits of the estates devised in trust for *Thomas*, should be applied in payment of the 1,000*l.* and interest, until *Thomas* would have attained the age of twenty-six. (2)

As to such worldly estate as it hath pleased God to bless me with, after my just debts shall be thereout first paid, and my personal charges defrayed, I give as follows :—

Imprimis, I devise my lands at *Datchet*, to my son *Edward Lassells*, for life, remainder to his first and other

(1) This case is taken from Lord Rep. 19. *Taylor and Smith v. Bid-*
Hardwicke's Note-book. *dall*, 2 Mod. 292.

(2) See *Boraston's* case, 2 Coke's

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sons in tail, remainder to his daughters. And I give all other my freehold and copyhold lands, tenements, and hereditaments, to my trustees in trust to pay the rents and profits thereof, towards the payment of all my debts, annuities, and legacies, until the same shall come to my son, *Thomas Lassells*.

The testator then appoints *Christopher Lethivallier*, his executor, and directs all the residue of his personal estate, after his debts, legacies, and annuities have been paid, to be laid out; and gives all the residue of his personal estate, and all his lands and real estate, (except that at *Datchet*,) to his son *Thomas*, and his heirs, when he attains twenty-six years, provided always, that in case his son *Thomas Lassells*, should die before his age of twenty-six years, then he gives to the plaintiff 1,000*l.* over and above what was before given to him, and in that case he gives all the lands, &c. given to *Thomas*, to his son *Edward*, and as to all such moneys, cloaths, and personal estate, as would have come to *Thomas*, if he had attained twenty-six, he gives the same, after payment of the legacies, to *Edward*.

Thomas Lassells having died before he attained the age of twenty-six years; this bill was brought for the legacy of 1,000*l.*, and it prayed that if the personal estate was not sufficient, then that the plaintiff might have satisfaction out of the real estate.

Mr. *Browne*, for the plaintiff.

The annuities being charged upon the real estate, the plaintiff has a right to come upon the real estate for so much as has been paid towards those annuities out of the personal estate.

By the first clause in the will, the whole of his estate is subjected to his debts. This construction has often been given to words of this kind. *Lord Warrington v. Leigh*, 1 Vern. 45. But should that be otherwise, there is a subsisting trust for the payment of debts; for the devise of the real estate in trust to pay debts, &c. till *Thomas Lassells* should attain twenty-six years, will continue notwithstanding his death, until such time as he would have attained that age, *Taylor v. Biddall*, 2 Mod. 292.

Mr. *Attorney-General*, and Mr. *Fazakerley*, for the defendant.

The gift to the plaintiff was made on the supposition that there would be sufficient personal estate to satisfy it. The question will be, how much of the personal estate

would have been coming to *Thomas*; there would have been nothing without this circuitry, and *Thomas* could not have had the benefit of this circuitry. Specific devisees shall not be affected in order to make good the legacies. As to how much of the real estate is subject to debts; the general words in the first clause, will be restrained by the particular provision made afterwards for debts, and there is no reason to extend those general words, unless the particular fund is not sufficient to pay the debts. The devise in trust till *Thomas* shall have attained the age of twenty-six, cannot be carried further, for the estate is devised over in case *Thomas* should die before he becomes entitled.

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LORD CHANCELLOR decreed payment of the legacy and interest, at 4 *per cent.* out of the personal estate, and if that shall not be sufficient, then out of the profits of the real estate devised to *Christopher Lethivallier* till *Thomas* should have attained twenty-six, and if that not sufficient, then the plaintiff to stand in the place of the annuitants to receive satisfaction for so much as they have exhausted of the personal estate. (1) Oct. 26, 1737.

(1) Reg. Lib. A. 1737. fol. 280.

PHILIPPA STANLEY, Administratrix of }
 HOBY STANLEY } Plaintiff; (1)

and

ANN STANLEY, Widow of WILLIAM }
 STANLEY, HANS STANLEY, an In- }
 fant Son of GEORGE STANLEY, RI- }
 CHARD BELLWARD, the Personal Re- } Defendant.
 presentative of the Surviving Trustee of
 the Settlement }

October 28, 1737.

Where by marriage settlement the estate of the wife was settled to the husband for life, remainder to the wife for life, remainder to trustees for a term of ninety-nine years, remainder to the first and other sons of the marriage in tail male, remainder to the heirs male of the husband by any other wife, remainder to his heirs in fee, and the trusts of the term were declared to be, that if the husband should have one or more younger son or sons living at his decease, which should respectively attain twenty-one years, then that the trustees should and might out of the rents, issues, and profits, or by sale, of the premises, raise the sum of 5,000*l.*, payable at such times, and in such proportions as the husband should by deed or will appoint, and in default thereof, to be equally divided amongst them, and to be paid at the age of twenty-one, or marriage; and to raise a sum for the maintenance of such children from and after the decease of the husband, until the portions should become payable, the first payment to begin and be made at such of the feasts as should first happen after the decease of the husband. A younger son having attained twenty-one in his father's lifetime, it was held, that he was entitled to have his portion raised in his mother's lifetime, with interest for the same, from the death of his father.

By a settlement dated the 15th of March, 1692, and made previous to the marriage of *William Stanley*, deceased, and *Ann Hoby*, the defendant, certain premises which were the estate of the wife, were settled to the use of *William Stanley* for life, remainder to trustees to preserve, &c., remainder to *Ann Hoby* for life, remainder to trustees to preserve, &c. remainder to trustees for a term of ninety-nine years, *sans* waste, remainder to the first and other sons of the marriage, in tail male, remainder to the heirs male of the body of *William Stanley*, by any other wife, remainder to his heirs in fee. The trust of the term of ninety-nine years, was declared to be, that if *William Stanley* should happen to have one or more younger son or sons living at his decease, which should respectively attain twenty-one years, and no daughter, then that the trustees should and might out of the rents, issues, and profits of the premises, or by sale of the same or of some part thereof, raise the sum of 5,000*l.*, payable at such times, and in such proportions as *William Stanley* should by deed or will appoint, and in default thereof to be divided equally amongst them, and to be paid at the age of

(1) This case is taken from Lord *Hardwicke's* Note-book.

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twenty-one, or marriage, and to raise a sum for the maintenance of such children from and after the decease of said *William Stanley*, until the portions should become payable, the first payment to begin and be made at such of the feasts as should first happen after the death of *William Stanley*.

Hoby Stanley was the only younger child of the marriage, and *William Stanley*, the father, died without having made any appointment of the said sum of 5,000*l.* *Hoby Stanley* having attained twenty-one in his father's lifetime, and having been paid by his father 1,000*l.*, part of his portion of 5,000*l.*, and having married and died intestate, this bill was brought by his widow and administratrix, in the lifetime of the mother, to have 4,000*l.* the residue of the portion raised out of the term for years, created by the settlement.

The question was, whether that sum was to be raised and paid during the lifetime of the mother.

Mr. *Browne*, for the plaintiff, insisted that as all the contingencies upon which the raising of the portion was to depend had happened, the money ought now to be raised, and that if the money was now raisable, interest would follow of course.

Mr. *Chute*, for the defendant.—If any thing appears in the settlement which even hints at the postponement of the period of raising the portion it cannot now be raised.

This is the wife's estate, and it does not appear that there is any other settlement on the heir male; a different method is prescribed for raising the maintenance from that in which the principal is to be raised; the one by rents and profits, the other by rents and profits, mortgage or sale.

This term could not have been sold in the lifetime of the father.

In *Brome v. Berkley*, 1 Eq. Ca. Abr. 340, and 2 P. Wms. 484., the raising of the portions was postponed because the first day of payment of the maintenance was directed to be made after the death of the father and mother. This case is not distinguishable from former precedents in our favour.

LORD CHANCELLOR decreed the sum of 4,000*l.* residue of the said 5,000*l.* portion to be raised by mortgage or sale as should be least prejudicial to the infant or his estate, together with interest for the same from the death of *William Stanley* the father, on distinctions from the former

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case (1) arising from the different penning of the deed, and the precedents. (2)

(1) See *Stanley v. Stanley*, ante, page 135.

(2) Reg. Lib. B. 1737. fo. 117.

PEARCE versus WARING. (1)

Appeal.

Oct. 29th, 1737.

2 Ves. 548.
Mr. Hall being entitled to considerable property under his uncle's will, five weeks after he comes of age settles an account with,

In the month of September, 1721, *Serjeant Hall*, being possessed of considerable real and personal estate, died, having by his will made the defendant *Waring* his executor; and having given, after payment of some pecuniary legacies, the residue of his real and personal estate to his nephew *William Shepherd Hall*.
and executes a release to, the executor of his uncle; Under the circumstances of the release being prepared and engrossed by the executor before the accounts had been submitted to Mr. Hall,—of Mr. Hall's not having examined the accounts,—of the account itself not giving sufficient information without inspecting the books, which were not delivered to him,—of there being likewise an error in the account by a sum of 570*l.* being charged twice;—of a gift likewise of 3,000*l.* East India Stock from Mr. Hall to the executor, at the time of the settlement of the will,—of the executor having, since the death of Mr. Hall, broken open a box containing papers, some of which related to the accounts, and taken away some papers, and having made entries in the books subsequent to Mr. Hall's death: It was held, that the stated account should be opened though many small accounts had been afterwards settled, and though there had been an acquiescence by Mr. Hall until the time of his death.

In December, 1731, *William Shepherd Hall* died having made his will, bearing date the 21st of August, 1726, whereby he appointed the defendant *Waring* his executor, and whereby after giving 3,000*l.* to the defendant *Waring* he gave the rest of his personal estate to trustees upon trust to lay out the same in the purchase of real estate to the use of the plaintiff Mrs. *Pearce*, and the heirs of her body. By a codicil of the 12th August, 1727, *William Shepherd Hall*, willed that the defendant *Waring* should be indemnified for all moneys disbursed for his (the testator's) use and paid for his trouble concerning him (the testator) or his affairs.

Mrs. *Pearce* filed a bill for an account of the real and personal estate of *Serjeant Hall* and of the personal estate

(1) This case is taken from Lord *Hardwicke's* Note-book.

of *William Shepherd Hall*, which by amendment, was made to impeach a gift of 3,000*l.* East India Stock stated by the defendant to have been given to him by *William Shepherd Hall*.

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The defendant *Waring*, as to so much of the bill as sought an account from him of the rents and profits of the real or of the personal estate of *Serjeant Hall* or *William Hall*, from the *Serjeant's* death to the 15th December, 1727, by plea insisted that he had kept a particular account of his receipts and payments from that time in two books, and that soon after Mr. *Hall* came of age he being willing to settle the said accounts, desired *Woolley* and *Hemmings* might be employed in taking such accounts. That the two books and the vouchers were delivered by him to *Woolley* and *Hemmings*, who compared the books with the vouchers and drew up the account which was delivered to Mr. *Hall*, who carefully perused it; and by which account it appeared a balance was due from the defendant *Waring* to *Hall*; whereupon *Hall* executed a release to *Waring*, dated the 15th December, 1727. That Mr. *Hall* desired the balance might remain in his hands, which he, *Waring*, consented to. And defendant *Waring*, by a second plea, insisted, that after the 15th December, 1727, until the 8th November, 1731, he had paid and received several sums of money and that he kept an account thereof in his book, and stated the vouchers, and that the said Mr. *Hall*, from time to time, considered the said accounts, and thereon allowed the same as stated accounts.

On the 9th of November, 1727, *William Shepherd Hall* came of age, and on the 15th of December following the first accounts were stated and the releases executed; and on the 12th of February, the several stocks were transferred except the 3,000*l.* East India Stock claimed by the defendant. The balance of the account continued in *Waring's* hands, and from that time to the death of *William Shepherd Hall*, the accounts were continued between them, and many were signed by the latter.

It appeared in evidence that about the beginning of October, previous to *William Shepherd Hall's* coming of age, the defendant put his books of account and some vouchers into the hands of Messrs. *Woolley* and *Hemmings*; but that they never received any directions from Mr. *Hall*, and understood that they were only to cast up and prepare the ac-

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counts for the inspection of Mr. *Hall*, and not to examine or audit them; and that in fact they were unacquainted with the nature of the property and value of the stocks and did no more than cast up the items and make some new entries from the vouchers.

Mr. *Hall* came down to the country from *London* on the 10th or 11th of December, upon which the accounts were laid before him; but there was no evidence of his having examined them, except that one of the account books was once seen before him.

The release dated the 15th of December, 1727, recited that *William Hall*, on perusal of the accounts had found them just and true; and that the release was executed in consideration of the premises, and of the payment of the balance, the receipt whereof was thereby acknowledged.

This release had been prepared by order of the defendant before Mr. *Hall* had come down from *London*, but it was read over to him before he executed it.

It was admitted that there was an error in the accounts of 570*l.* twice charged.

The 3,000*l.* East India stock did not appear in any of the accounts; but on the 22nd of January, Mr. *Hall* signed a paper expressing his reasons for making the gift.

The defendant admitted that he had made some new entries in the accounts since Mr. *William Hall's* death, particularly relating to the 3,000*l.*; and it was proved that since that time the defendant had caused the bottom of a box, belonging to Mr. *William Hall*, which had been locked and sealed and left in his custody, to be taken off; that he had taken out several papers, which however, he represented related only to an election at *Ludlow*.

This cause came on to be heard before the *Master of the Rolls*, when his Honour ordered and declared that the accounts preceding the 15th December, insisted on by the defendant *Waring's* first plea be set aside; that the accounts insisted on by the second plea do stand except as to the balance of the preceding accounts brought into those accounts; and directed an open account of the real and personal estate of *Serjeant Hall* and the personal estate of *William Hall*, and reserved the consideration of the 3,000*l.* India Stock until after the Master had made his report. This cause now came on before the *Lord Chancellor* upon an appeal from that decree.

Mr. *Attorney-General* and Mr. *Clarke* for the defendant. Accounts so solemnly settled ought not to be overturned. It is not necessary that every allegation should be proved. *Woolley* and *Hemmings* had the vouchers before them, and it was not the defendant's fault that they did not examine them; but, in fact, some new entries were made by them from the vouchers. Mr. *Hall* himself had full opportunity of examining the accounts, and if, with his eyes open, he preferred trusting to the confidence he reposed in Mr. *Waring*, he is equally bound by what he has done,—if not, a careless man would fare better for being careless.

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Mr. *Browne* for the plaintiff. Every allegation necessarily made in support of the defendant's case is disproved. He alleges that Mr. *Hall* gave directions to *Woolley* and *Hemmings* to state the account. That the accounts and vouchers were delivered to them, and that they compared them.

That the accounts contained entries of particular items, and that they were laid before Mr. *Hall* himself, and that he inspected the receipts and vouchers, whereas the entries are of gross sums without any distinction of principal and interest.

As to the 3,000*l.*, there was no notice taken of it in the accounts delivered at that time, although the defendant has since Mr. *Hall's* death, made an entry of that sum as if done at the time. Mr. *Hall*, by his will, made when he was only seventeen, had given the defendant 3,000*l.*, and he conceived this gift to be of that amount, whereas the 3,000*l.* East India stock is worth near 5,000*l.*

LORD CHANCELLOR.—The first general question on this appeal is, whether the account as it is called of the 15th of December, 1727, insisted upon by the defendant's first plea, ought to be allowed and established generally. Next, admitting that it ought not, whether it ought to be set aside totally, and an open account decreed; or whether it ought to be directed to stand, with liberty for the plaintiff to surcharge and falsify it.

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As to the first, whether the account ought to be allowed and established generally, I think that there is no colour for it; because, first, the plea is not proved, so far from it that it is rather disproved by the defendant's own witnesses. It is truly said, that it is not necessary to prove every circumstance pleaded, but all material facts must be proved. To shew that that has not been done in this case, it is only necessary to compare the material facts pleaded with the

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evidence. 2dly. There are material errors affecting sums of considerable amount shewn in these accounts. The next question is, whether these accounts ought to be set aside totally, and an open account decreed, or whether they ought to stand, with liberty for the defendant to surcharge and falsify.

This is a point always in the discretion of the Court, and in deciding which, the Court ought to be governed by the fairness of the defendant's proceedings and the circumstances of the case. The material circumstances in this case are, 1st, The facts preceding the account and release. 2dly, The manner of stating this account, and the circumstances attending it. 3dly, The circumstances subsequent to it. As to the facts preceding the account and release, it is admitted that Mr. *Hall* came of age on the 9th of November, 1727, and a design appears to have been formed to gain a stated account of an estate of the value of nearly 80,000*l.*, and to get releases executed as soon as he came of age. But how was Mr. *Hall* assisted in the examination of these accounts? by two persons employed by Mr. *Waring*, and not acting under any authority from Mr. *Hall*, for nothing has been proved to have been said or written by him to that effect. Then the release was prepared with all its recitals by Mr. *Waring*, containing an ample commendation of his own fidelity, and in which Mr. *Hall* is made to admit that he had perused the account, and that he had found it just and true; and so far was this carried, that the defendant got the release engrossed before Mr. *Hall* came down, or had (so far as appears) been made at all privy to it.

2dly. As to the manner of stating the account, and the circumstances attending it, it appears that Mr. *Hemmings* and Mr. *Woolley* were strangers to the estate, and that they were employed only to cast up and methodize the account. They have sworn that the vouchers were not laid before them, and that they did not inquire into the truth of the entries, but took them upon the credit of the defendant. It is objected that this is contradicted by the fact, for that it is sworn that some of the vouchers were produced, and that they compared several of them with the entries in the books, from whence it is said, that it ought to be inferred that they saw all the vouchers, but that is more than is sworn by the plea, which only alleges that they inspected the vouchers, or such of them as they thought fit. I cannot make a presumption that their authority, or what they did,

was different from what they, who are his own witnesses, have sworn it to be. It is very probable, that those vouchers which were produced were only to enable them to make the new entries.

It appears then, that these persons did not audit or state this account. But what did Mr. *Hall* himself do?

There is no evidence that he examined it, indeed he had no time for it; he only asked *Woolley* and *Hemmings* if it was rightly cast up, and there is no evidence that he saw any vouchers.

What then does all this come to?—That Mr. *Hall* executed a release, reciting an account stated when it was not, or stated only on one side, and extending to the whole estate, which in the words include every thing in Mr. *Waring's* hands, though not delivered over. It does not appear that Mr. *Hall* had any part of the account, or so much as a copy delivered to him, and if he had, and had read it over, he could not have learned any thing from it without looking through all the books, none of which it is pretended he saw, except one marked C. C., which was once seen laying by him, and at the same time a gift, or a promise at least of 3,000*l.* East India stock was obtained from him by way of present.

This was an act unbecoming a guardian, such an act as if any young man, within a month after he came of age, had offered to do, his guardian should have advised him against and withstood. This is a circumstance of very ill appearance, and demonstrates a prodigious influence over the young man. The value of the stock was between 4,000*l.* and 5,000*l.*

3dly, As to the circumstances subsequent to the account and release. Some of them are in favour of the defendant, others in favour of the plaintiff.

Those in favour of the defendant are the many small accounts stated afterwards, and the acquiescence of Mr. *Hall* up to the time of his death.

These circumstances might have been of weight, if Mr. *Hall* had been fully informed; if he had had one part, or a copy of the account, to have examined and sifted; but it is plain that he took the whole upon trust. It is, however, objected, that a man may state an account on a confidence in another if he pleases. So he may; and if the person deals fairly and justly, and does not abuse the trust, it is

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London, who were both sons of *William Hudson*, empowering them to get in and receive all moneys due to them as joint administrators of *John Hudson*.

On the 27th of March, 1732, *William Hudson*, the joint administrator with the plaintiff, without his privity, settled the account with the defendants, *Benjamin* and *Joseph*, and gave them general releases.

The object of the present suit was to obtain an account of the personal estate of *John Hudson* against *Thomas Hudson*, executor of *William* the administrator, and to set aside the stated accounts and the releases which were executed, and to obtain an account against *Benjamin* and *Joseph Hudson*, for what they had received under the letters of attorney.

The defendants, *Benjamin* and *Joseph*, insisted upon the accounts stated, and the release.

Mr. *Browne* for the plaintiff, contended that a release by an administrator was very different in effect from one by an executor. *Wentw.* 373, *in addendis*. That it was more like the case of two trustees, and that in the present case there was evidence of fraud. That the account was collusive, and was not so much as sworn to be just and fair.

Mr. *Attorney-General* and Mr. *Fazakerley* for the defendants. An executor may release a debt and assign a term, and an administrator stands in his place. Before the statute of 22 & 23 *Car. II.* the administrator might retain the estate. It is not material that administrators do not resemble executors in all respects, it may be granted that one cannot assign a term; but payment to one of several executors is good, and that one may give a discharge. Administrators may release, which shews that they have an interest in them. *Adams v. Buckland*, 2 *Vern.* 514. Theirs is an authority coupled with an interest. *Dyer*, 339. *Dr. Drury's Case*, 8 *Co.* 143 b. In this cause a demurrer was put in, upon the ground that the administration did not survive upon the death of one: but the Court held that it did, *Ca. Temp. Talb.* 127., which shews that there is an interest. Supposing that a release by one administrator would not in ordinary cases be binding upon the others, yet, in the present, the letters of attorney make the difference. Here is a joint letter of attorney. The defendants acted as factors to two joint merchants. The administrators must be considered as partners, in which case one may release.

LORD CHANCELLOR.—There are two questions in this case which are merely matters of law.

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Nov. 4, 1737.

First, Whether a release of a debt, or conveyance of a term, by one administrator, will bind his companion, where there is a joint administration granted.

Secondly, Whether the defendants acting, and collecting part of the estate, under a letter of attorney from both the administrators, will vary the case.

As to the first point. I am of opinion that one administrator cannot release a debt, or convey an interest, so as to bind the other; and that the case of an administrator differs from that of an executor.

It is certain that executors have such a power, and the reason is, that each executor is considered as entirely representing the testator. If an action is brought against joint executors, who plead different pleas, some books say, that plea shall be received which is most for the benefit of the testator's effects, and this shews each executor may plead in right of his testator.

But the case of executors differs essentially from that of administrators; executors receive all their power and interest from the testator, and though, before they can maintain an action, they must prove the will,(1) yet the probate is only a declaration of the proper court that they are executors, which, by the law of *Scotland*, is called confirming the executors to the testator, and is the same in effect as is done here, and still the interest arises not from the probate, but from the testator; therefore, an executor may release a debt,(2) or assign a term before probate,(3) and if after probate he sues for the same, the precedent act done by him may be pleaded in bar: but not so of an administrator, for upon an action brought by such an administrator after letters of administration granted to him, his release or assignment will not bar him. If an executor appoints another to be his executor, and dies, such second executor shall be the immediate representative to the first testator; but on the death of an administrator, his whole interest determines, and

The interest of an executor arises not from the probate, but from the testator, therefore he may release a debt, or assign a term before probate.

(1) Before probate an executor may commence an action, though at the trial the probate must be produced. 11 Vin. Abr. p. 203. pl. 2. 1 Rol. Abr. 917. a 2. *Dyncombe v. Walker*, 1 Vent. 370. So he may file a bill before probate. *Humphreys v. Humphreys*, 3

P. Wms. 351, and it is sufficient if he obtain probate before the hearing, *Patten Executrix v. Panton*, cited 3 Bac. Abr. 53.

(2) *Middleton's case*, 5 Co. 28 a. 9 Co. 39 a. Co. Lit. 292 b.

(3) *Dyer*, 367 a. pl. 39.

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If a debtor be made executor, the debt is totally extinguished, otherwise if he be appointed administrator, for it is no extinguishment of the debt, but a suspension of the action, and his representative will be chargeable at the suit of the administrator *de bonis non*, &c., of the first intestate. The right of executors and administrators depends on different foundations, the latter arising from the ordinary, the former from the testator.

An administrator properly defined, a private office of trust being more than a bare authority, and yet less than the interest of an executor.

administration *de bonis non*, &c. must be granted to another.

So if a creditor makes his debtor his executor, the debt is totally extinguished, and cannot be recovered, (1) though the executor should afterwards die intestate, and administration *de bonis non*, &c. of the first testator should be granted: but if a debtor be appointed administrator, that is no extinguishment of the debt, but a suspension of the action, and his representative on his death would be chargeable at the suit of the administrator *de bonis non*, &c. of the first intestate, Salk. 299. 8 Co. 135. These cases evince the different foundations on which the rights of executors and administrators depend, the power of the latter arising wholly from the ordinary, of the former from the testator.

The right of an administrator is expressed so differently in the books, as if they were at a loss how to describe it. In 8 Co. 135 b., it is called an authority, because the administrator has nothing to his own use; in Vaughan 182., it is with greater propriety called a private office of trust, for it is more than a bare authority, and less than the interest of an executor, which seems to have been the foundation of Lord Cooper's opinion in the case of *Adams v. Buckland*, 2 Vern. 514.

If therefore an administration be in the nature of an office, what will the consequence be in the present case, for if an office is granted to two, they must join in the executing the acts of the office, and one cannot act unless in the name of both, and on this kind of reasoning the present case will depend.

There has been no case cited, except Dyer 339., and Co. 143 b., which turns on the repeal of letters of administration; and, indeed, I can find but one authority in the present case, and that in a little book, but that little book the work of a very great man, Lord Bacon, in his Elements, 4th vol. new edition, page 83 and 93, seems to correspond

(1) So *Wankford v. Wankford*, 1 Salk. 299. But in equity the executor is only considered on a deficiency of assets as a trustee of the debt for creditors, *Holliday v. Boas*, 1 Rol. Ab. 926. *Askwith v. Chamberlain*, 1 Ch. Rep. 138. *Field v. Clarke*, ib. 242. So he

is considered as trustee for legatees or next of kin, where it can be collected from the testator's intention, that he did not mean to extinguish the debt; see *Fox v. Fox*, post p. 162., and the cases there cited.

with my opinion, as to the nature of the different rights of executors and administrators, therefore I think the release of one administrator will not bar the other. (1)

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The next question is of another consideration, whether the defendants having acted under the letters of attorney of both administrators, and being therefore accountable to themselves in their own right, and not as administrators, the release of one may not bar both, and I think it may.

The cases consider them as representing the intestate, and suing in that right, where they must name themselves administrators, and so says Lord *Bacon*; but here both administrators execute a letter of attorney, to empower the defendants to collect the effects, and receive the intestate's debts, and so far as they have acted under that authority, they are answerable to the administrators in their own right, and might be charged as their bailiffs and receivers, and they need not name themselves administrators, and if non-suited, they must pay costs as suing in *jure proprio*

A person acting under a letter of attorney from administrators may be sued by them in their own right as a bailiff or receiver, and need not name themselves administrators.

If there is a joint debt owing to two, and one releases, the action is gone, whether it arises on bond or simple contract.

It has been said, that some part of the intestate's estate has been received by the defendants in specie, upon which name themselves so, yet they need not do it, for they may sue in their own right.

Though administrators in trover may

(1) A release of one administrator will not prejudice the other, *Horner v. Burrell*, Toth. 264, 265., and in *Bacon's Law Tracts*, 162., "Any one executor may convey the goods, or release debts, without his companion, and any one by himself may do as much as all together; but it is not so with administrators, for they have but one authority given them by the bishop over the goods, which authority being given to many, is to be executed by all of them joined together." In *Jacomb v. Harwood*, 2 Ves. 267., Sir J. *Strange* says, "That though in *Hudson v. Hudson*, it was said that the Lord Chancellor had been of opinion, that one administrator could not release so as to bind the other, yet when that case was more narrowly looked into, it appeared clearly that that was applicable to the particular circumstances of that case. But he said in *Willan v. Fenn*, it was held in B. R. after three arguments, that one ad-

ministrator stood on the same ground and foundation with one executor." The following statement of the case of *Willan v. Fenn*, appears in Serjt. *Hill's Viner*, "Debt by plaintiff as administrator,—plea, release from the plaintiff's co-administrator, on which the plaintiff demurred, and after much argument, and many authorities cited, the Court inclined against the plaintiff, notwithstanding the case of *Hudson v. Hudson* was cited; a distinction was taken at the bar, between payment to one and release by one, without payment; but no notice was taken by the Court of that distinction, and the case was adjourned, Trin. 1738, B. R., and the Court inclined against the plaintiff, but the cause was adjourned, and there is a note, that it was afterwards compromised; but in another manuscript it is said that judgment was afterwards given for the defendant," 11 Vin. Ab. 72. See *Shep. Touch.* 484.

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the right of administration should subsist; but I apprehend in such case, the release of one administrator would be a bar, for these things were in effect delivered to them by the administrators themselves, for which they must sue in their own right, and therefore the release of one bars the other; for though in trover they may name themselves administrators, yet they need not do it.

Then the question is, what a court of equity will do with a release that is effectual at law. If it was unfair and collusive, a court of equity ought to set it aside, and upon the evidence here, the releases appearing to be unfairly obtained, were set aside.

And as to the defendants *Benjamin* and *Joseph Hudson*, His Lordship declared that the plaintiff is not barred by the accounts stated, and the releases executed by their father, from demanding an account against them in equity, and directed an account against them of the personal estate of *J. Hudson*. (3) (4)

On the 22nd of April following, this cause was re-heard upon some matters of account directed by the decree, but which did not affect the present question, and the decree was affirmed in every point but one.

(3) Reg. Lib. A. 1737. fol. 138.

(4) *Hudson v. Hudson*, came before Lord Talbot upon a question whether administration survives, upon the death of one of the administrators, and Lord Talbot, in conformity with *Adams v.*

Buckland, decided by Lord Cowper, 2 Vern. 514., but in contradiction to *Bowden v. Bowden*, which was determined in the ecclesiastical court, Held, that administration survives. Cases temp. Talb. 127

JOHN PALMER, and SUSANNA his }
Wife, JOHN MAYSENT PALMER, } Plaintiffs; (1)
and SUSANNA PALMER, Infants . }

and

WILLIAM MAYSENT, Executor of JE- }
REMLIAH MAYSENT, and Others . } Defendants.

Nov. 7th, 1737.

1 Atk. 505.
1 Dick. 70.

THE testator by his will, dated 8 August, 1723, gave to the plaintiff *Susanna*, the wife of *John Palmer*, 10*l.* To *John Maysent Palmer*, 500*l.* to be paid to him at twenty-one, and if he dies before that time, then he gave that sum to the defendant, his executor. The testator also gave 100*l.* to his grand-daughter, the infant, *Susanna Palmer*, to be paid to her at twenty-one, or marriage with consent, and if she dies before, then he gave the same to his executor, and made him residuary legatee.

A testator gives to his grand-daughter a legacy, to be paid to her at twenty-one or marriage, but if she dies before, then he gives the same to his executor. Upon a bill for interest, and to secure the

principal; it was held, she was not entitled either to the interest, or to have the principal secured. (2)

The bill prayed amongst other things, that these legacies to the infants might be paid and secured, and that if the personal estate was not sufficient for that purpose, that they might be raised out of the real estate, and that interest might be allowed and paid for their maintenance.

The defendant admitted assets, stated that he had paid the legacy of 10*l.*, and insisted that he had a right to retain the two other legacies of 500*l.* and 100*l.* without interest, till they should respectively become payable.

The LORD CHANCELLOR decreed that the plaintiff, the infant, should have liberty to apply for payment of the 500*l.* and 100*l.*, when they should become payable under the will.

Mr. *Atkyns* states, that another point arose in this cause between a specific devisee of land under the will, and the heir at law of the testator, whether the former should contribute equally with the latter in the payment of debts where the personal estate was not sufficient, and that the

(1) This case is taken from the statement of the bill and answer as extracted by Mr. *Dickins*, in 1 Dick. 70., and from Lord *Hardwicke's* Note-book.

(2) The cases have now decided

that the Court will secure a contingent legacy, *Studholme v. Hodson*, 3 P. Wms. 300. *Green v. Piggott*, 1 Bro. Ch. Ca. 105. *Cary v. Askew*, 1 Cox. 244.

PALMER
v.
MAYSENT.

Lord Chancellor said, that where there is a specific devise of lands, the specific legatee shall never contribute upon an average with the heir at law towards satisfaction of creditors while the real assets of the heir are sufficient. No mention is made of this point, either in Mr. *Dickens's* report of this case, or in Lord *Hardwicke's* Note-book.

FOX v. FOX.(1)

Nov. 7th, 1737.

1 Atk. 263.

William Fox mortgages his estate to *Thomas Fox*, who paid no money, but gave a bond to *William* for 130*l*.

William Fox by his will makes *Thomas*

his residuary legatee, and appoints him his executor. Upon a bill filed by the heir at law of *William*, against *Thomas*, to have the real estate exonerated from the mortgage debt, it was held, that the bond debt was not extinguished in equity; (2) and that the debt due from the executor must be brought into the account of the testator's personal estate, and after the payment of the other debts, funeral expences, and legacies, the testator's personal estate was to be applied in satisfaction of the mortgage debt.

Thomas Fox gave a bond of the same date for the payment of the sum of 130*l*. to *William Fox*.

William Fox by his will, bearing date the 10th of September, 1731, gave and bequeathed to his loving brother, *Thomas Fox*, (the defendant,) all the rest of his personal

(1) This case is taken from Lord *Hardwicke's* Note-book.

(2) At law the debt is extinguished, but in equity, the executor, on a deficiency of assets, as to creditors is a trustee in respect of the debt, which is considered as part of the testator's personal estate, *Wankford v. Wankford*, 1 Salk. 299. *Brown v. Selwyn*, For. Rep. 242. So he is a trustee for legatees, where it can be collected from the will that the testator did not intend to extinguish the debt; as where the debt is expressly devised to pay a legacy,

Flud v. Rumsay, Yelv. 160.; or where the words, in a residuary clause, are sufficiently comprehensive to embrace it. *Brown v. Selwyn*, For. Rep. 240. 4 Bro. P. C. 179. *Phillips v. Phillips*, 2 Freem. 11. See *Askwith v. Chamberlain*, 1 Ch. Rep. 138. *Field v. Clarke*, 1 Ch. Rep. 242. So where the testator leaves his executors legacies, *Carey v. Goodinge*, 3 Bro. Ch. Ca. 110.; or where an executor is considered by the testator as a mere trustee of his whole property, *Berry v. Usher*, 11 Ves. 87.

estate, goods and chattels whatsoever, and appointed him executor. The plaintiff, who was the heir at law of *William Fox*, filed the bill, to have the real estate exonerated of this mortgage.

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v.
Fox.

Mr. *Browne* and Mr. *Fazakerley* were counsel for the plaintiff.

Mr. *Floyer* for the defendant admitted, that generally the heir is entitled to have the personal estate applied in exoneration of the real, but contended that the plaintiff was not entitled to have this sum of 130*l.* so applied, for that the will operates as a release and extinguishment of the debt, and amounted to giving a legacy of that sum.

LORD CHANCELLOR.—In this case I was of opinion that the debt of 130*l.*, due from the defendant, the executor, should be brought into the account of the personal estate, in order to exonerate the real estate from the mortgage; because the creditor might recover it at law on the covenant, and this would be considered as assets notwithstanding the legal extinguishment, *Yelv.* 160., and the heir stands in the place of the creditor. That a residuary legatee might call for this debt out of the hands of the executor as assets, and so it was determined in the case of *Phillips v. Phillips*, 1 Ch. Ca. 292. and *Brown v. Selwyn*, in Dom. Proc. 21 March, 1734, and the right of the heir to be exonerated is stronger than, and superior to the right of the residuary legatee, because he could take away the assets from the residuary legatee in case of his inheritance, and therefore in the cases of *Phillips v. Phillips*, and *Brown v. Selwyn*, if there had been an heir who had sued afterwards to have his inheritance exonerated, he might have recovered the assets for that purpose after the residuary legatee had recovered against the executor, which would be absurd if he had not this right. As to the objection that the heir at law stands in the place of the testator, so doth the residuary legatee as to the personal estate.

Decreed a redemption, and account of the personal estate, and this debt from the executor to be brought into the account.

Referred it to the Master to see what was due for principal and interest on the mortgage; and that the defendant should account for the personal estate of the testator, and in such account the sum of 130*l.* and interest, due from the defendant on bond to the testator, is to be brought in and considered as so much assets in his hands; and decreed that the testator's personal estate be applied in a course of

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administration ; and if any thing shall remain after payment of the testator's other debts, funeral expenses, and legacies, the same is to be applied in satisfaction of the said mortgage debt ; and if that shall be sufficient, then it is ordered that the defendant reconvey the said mortgaged premises ; but if the same shall not be sufficient, upon the plaintiff's paying to defendant so much, or such part as the same shall not be sufficient to satisfy the mortgage, together with the costs of the suit, then it is ordered that the defendant reconvey the said mortgaged premises.(1)

(1) Reg. Lib. A. 1737. fo. 789.

MARY RIDOUT, Widow and Executrix } Plaintiff ; (1)
of WILLIAM RIDOUT }
and
DOWDING and Others Defendants.

November 8th, 1737.

1 Atk. 418.

A testator devises his estate to his wife for life, subject to a term of 2000 years, which he gives to his trustees, from the day of his death, upon trust, with the consent and direction of his wife to raise money for the payment of his debts. The term, though subsequent, shall take place of the wife's estate for life, in case of a deficiency of personal estate to pay debts.

WILLIAM RIDOUT being entitled to a certain real estate by lease and release of the 24th and 25th October, 1727, conveys the same to trustees and their heirs to the use of himself for life, remainder to the use of such person and persons, and upon such trusts as he shall declare and appoint by will, deed, or writing. By his will of the 27th October, 1727, he limits and appoints his real estate to *Mary*, his wife, for life, without impeachment of waste, except in houses, with power to take all necessary botes, subject and liable nevertheless to the trust of a certain term of 2000 years ; which he then gives to trustees from the day of his death upon trust, *with the consent and direction of the plaintiff, testified in writing under her hand and seal, in the presence of three witnesses*, to raise money for the payment of his debts and funeral charges, with remainder after his wife's death to

(1) The statement of this case is taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*, which corresponds with the minutes of the judgment in Lord *Hardwicke's* Note-book.

the heirs of his body, remainder in fee as to part to *James Dowding*, remainder in fee as to the residue to *Joseph Dowding*, and gives the residue of his personal estate to his wife, whom he appoints his executrix, and dies without issue.

RIDOUT
v.
DOWDING.

The defendants set up several demands upon the estate of *William Ridout*, and particularly the defendant *Dowding*, who claimed by bond and otherwise.

LORD CHANCELLOR.—A testator in the first part of a will gives his wife an estate for life in particular lands, and in the latter part creates a term for years, to take place from the day of his death, in trust for raising sums of money to discharge his debts, in such manner as the wife should direct.

Nov. 8, 1737.

The question is, Whether the wife is entitled to have her estate for life discharged of the term.

Notwithstanding the testator has in the outset of his will given her an estate for life, yet, I am of opinion, the term, though subsequent, shall take place of the wife's estate for life; and it is plain it was his intention it should be so, by making use of these words, "the term to take place from the day of his death." (1) And it is immaterial how a testator places the several devises in a will, because the whole must be construed together, so as to make it consistent; and here it is not subject to a bare naked term only, which might have admitted of some doubt, but to the trust of a term to raise money for discharging the testator's debts, and the words that follow, "in such manner as his wife should direct," do not intend the wife shall have a power of exempting her estate for life, but only that she may raise it in the most convenient method, either by mortgage or otherwise.

It is immaterial how a testator places the several devises in a will, because the whole must be construed together, so as to make it consistent.

His Lordship decreed, if the personal estate of *William Ridout* was not sufficient to pay his debts, that the trustees should, with the approbation of the Master, sell the term of 2000 years to make good such deficiency. (2)

(1) These words appear in Lord in his edition of *Atkyns*) in the *Register's* Book.
Hardwicke's Note-book, though they do not appear (as stated by Mr. *Sanders*,

(2) Reg. Lib. B. 1737. fo. 99.

SHRAPNELL Plaintiff;(1)
 and
 BLAKE, a Bankrupt, and TROTT and }
 HUTCHINS his Assignees Defendants.

Nov. 9th, 1737.

2 Eq. Ca. Ab.
603.

A mortgagee
cannot tack his
subsequent
bond debt
against a se-
cond mort-
gagee, or
against credi-
tors.(2)

BLAKE was seised in fee of a copyhold estate, held of the manor of ——— and upon the 5th of October, 1725, made a conditional surrender of it to the plaintiff to secure 400*l.* and interest, and afterwards borrowed of the plaintiff 50*l.* upon bond, and afterwards by two surrenders, the first dated the 26th of May, 1733, the other the 27th of May, 1734 *Blake* mortgages his estate to the defendant *Trott* for 650*l.* The 29th of August, 1734, *Blake* became a bankrupt. Some time in October, 1734, the plaintiff delivered ejectment against the tenants to get possession of this estate. Upon the 30th of October, 1734, the defendants, *Trott* and *Hutchins*, as assignees, gave the plaintiff notice that they would pay him his money, due upon the mortgage, the 11th of November following, at the Exchequer, in the castle of ——— where it is made payable, by the surrender, and which, as appeared by full proof, was the usual place for the receipt for the money due upon mortgages. Upon the 6th of November, 1734, the plaintiff filed his bill in this court for a foreclosure, not having attended at the time and place

(1) This case is taken from Equity Cases Abridged, which agrees with the statement of the case in Lord *Hardwicke's* Note-book. The only judgment found in Lord *Hardwicke's* Note-book, is "Decree, a redemption."

(2) Nor can he tack his bond against creditors under a trust created by the will of the mortgagor for the payment of debts. *Heams v. Bance*, 3 Atk. 630. *Price v. Fastnidge*, Amb. Rep. 686. *Hamerton v. Rogers*, 1 Ves. jun. 513. Nor against an assignee of the equity of redemption. *Vanderzee v. Willis*, 3 Bro. Ch. Ca. 22. *Adams v. Claxton*, 6 Ves. 229. *Troughton v. Troughton*, 1 Ves. 88. Nor, by the modern dicta of judges, against

the mortgagor, *Anon.* 2 Ves. 663. *Challis v. Casborne*, 1 Eq. Ca. Ab. 325. pl. 9. *Lowthian v. Russell*, 3 Bro. Ch. Ca. 162. *Jones v. Smith*, 2 Ves. jun. 376. Though in some former cases the contrary has been decided, *Baxter v. Manning*, 1 Vern. 244. *Anon.* 1 Salk. 84. But a mortgagee may tack his subsequent bond against the heir of the mortgagor, *Shuttleworth v. Laycock*, 1 Vern. 245. *Pearce v. Saxby*, 6 Vin. Ab. 222. pl. 4. *Coleman v. Winch*, 1 P. Wms. 775. Or against his executor where the mortgage is for a term of years, *Anon.* 2 Vern. 177. Or against the devisee of the mortgagor, *Challis v. Casborne*, 1 Eq. Ca. Ab. p. 325. pl. 9.

appointed to receive the money. The defendant *Trott* brought a cross-bill to redeem the plaintiff's mortgage, upon payment of principal and interest, due to the 11th of November, 1734. *Shrapnell*, the defendant in the cross-cause, insists upon being paid the bond debt of 50*l.* as lent upon security of the mortgage, and that at the time of lending it it was agreed that the mortgage should stand as a security for it, and insists upon *Trott's* mortgages being only colourable and fraudulent, to cover the estate from his debts. *Note*,—*Trott* was *Blake's* son-in-law, and *Trott* had made no proof in the cause of the payment of the pretended consideration money for the two mortgages.

SHRAPNELL
v.
BLAKE.

LORD CHANCELLOR.—This bond debt cannot possibly be tacked to the mortgage; an heir shall never redeem without paying both, because the equity of the redemption is chargeable as assets in the hands of the heir to pay off the bond debts; and therefore, to avoid circuity, the heir must pay them both before he can be entitled to a redemption. By all the late cases, a mortgagee cannot (1) insist upon being paid a bond debt, even against the mortgagor himself, and it is still stronger against a second mortgagee, or assignees of a commission of bankrupt; and in the latter case the creditor is not entitled to the whole debt, but rateably and proportionably with the rest of the creditors. As to the interest since the tender, it is a very particular case; in common cases, six months' notice is necessary to raise the interest, and, except a particular place is agreed upon, there must be a personal tender. In the present case, the Exchequer at the castle is fixed upon by the mortgagee for the payment of the money, but in strictness that relates to the payment of it upon the day mentioned in the mortgage; though as it appears by proof that it had been the usual method to pay off mortgages there, I think the notice is in that respect sufficient. A tender after a bill or ejectment brought, is quite different from one made before, because a demand is thereby made of the mortgage money, and therefore he is obliged to take it at less notice than six months, and within a reasonable time according to the circumstances of the case. But in the present case, there was a controversy to whom the equity of redemption belonged; the assignees, indeed, gave

Between 9th
and 12th Nov.,
1737.

Interest on
mortgage not
stopped by
tender where
the right to
the equity of
redemption is
controverted.

(1) The word "not" has been inserted in order to make the passage intelligible. This alteration is consistent

with the decree, and a dictum of Lord *Hardwicke's* in 2 Ves. 663.

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v.
BLAKE.

the notice, but one of the assignees, *Trott*, now insists upon a right to redeem in his own private right; and it was impossible that any assignment could be made till that point was settled; and it is a point very properly controvertible by the plaintiff; for, if the mortgages were substantiated, they will exhaust so much of the estate as would otherwise be liable to pay off this bond debt in proportion to the rest of the creditors, and there must be an enquiry before the Master, or by directing an issue whether any money was really lent upon these mortgages; and must the plaintiff's interest cease till the point be settled? Suppose no bill or ejectment had been brought, and there had been regular six month's notice, and it had been controvertible to whom the assignment should be made, the interest of the mortgage would certainly not cease from that time, because he refused to receive the money. The plaintiff must have his interest till the time fixed by the Master for his receiving it, after it has been settled whether the mortgages were made upon a good consideration or not. (3)

(3) By the decree in the Register's Book it was referred to the Master to see what was due to the plaintiff *Shrapnell*, for principal, interest, and costs on his mortgage, and to enquire whether the sums mentioned as the consideration of the mortgages claimed by defendant *Trott*, were really and *bonâ fide* paid and advanced by him to *John Blake* the bankrupt; and if the Master should find that nothing was advanced, then upon payment by defendants *Trott* and *Hutchins* to plaintiff *Shrapnell* of what was due to him for principal, interest, and costs, in respect of his mortgage, he should convey to them the mortgaged premises; but in default of payment they should be foreclosed; but if the Master should find that anything was advanced by defendant *Trott*, then he was to be at liberty to redeem; but in default should be foreclosed, and the cross-bill exhibited by *Trott* against *Shrapnell* should be dismissed with costs. And it was ordered that the defendants *Trott* and *Hutchins* should pay unto

Shrapnell his mortgage money and costs, or should be foreclosed. But in case the Master should find anything due to *Trott* in respect of his mortgages, and he should pay to plaintiff *Shrapnell* what was due on his mortgage, then it was ordered that the mortgaged premises should be sold; and out of the moneys arising from the sale, the defendant *Trott* was to be paid what was due to him in respect of *Shrapnell's* and his own mortgage; and in case sufficient was not raised by sale, *Trott* was to be a creditor under the commission, to receive a satisfaction with the bankrupt's other creditors. And it was ordered that the Master should compute what was due for principal and interest to *Shrapnell* in respect of his bond, and for so much as the Master should find due, interest to be computed to the time of issuing the commission, he was to come in as a creditor under the commission to receive a satisfaction with the other creditors of the said *John Blake*. Reg. Lib. B. 1737. fo. 58.

BICKLEY v. DORRINGTON. (1)

Appeal from the Rolls.

Nov. 12th, 1737.

THE bill was brought by the creditors, and one of the residuary legatees of the testator *Penny* against his executors, the other residuary legatee, and *Olley* as a debtor to the testator's estate for the purpose of having the debt due from *Olley* applied in satisfaction of the plaintiff's demands.

A suit cannot be maintained by a creditor or legatee against a debtor to the testator's estate. (2)

The bill stated that for several years prior to June 1715, the testator, *Thomas Penny*, and *Olley* carried on the trade of leather-sellers in partnership together; but in 1715, the testator agreed to give up the management of the trade to *Olley*, until one of the testator's sons was capable of undertaking the trade, and become partner with *Olley*. On the 24th June, 1715, articles of agreement were entered into between the testator and *Olley*, reciting that they had that day divided their stock, and that there remained due to the testator 2,261*l.* 3*s.* 0*¼d.* That *Olley* was indebted to the testator in 200*l.* on bond, and *Olley* thereby covenanted to pay to the testator 1,261*l.* 3*s.* 0*¼d.*, with interest, and also the said 200*l.* with interest till paid, and the testator agreed that he would let 1,000*l.*, residue of the said 2,261*l.* 3*s.* 0*¼d.* remain in the hands of *Olley* for five years without interest; and it was thereby agreed that the sole benefit of the said trade for five years then next should accrue to *Olley* for his sole use without account; and *Olley* agreed to pay the testator 200*l.* yearly for five years; and it was thereby agreed that *Olley* should, within the five years admit *Samuel Penny*, the testator's son into partnership, who was to have an equal benefit with *Olley*, and that from the commencement of such partnership, *Olley* should cease to pay 200*l.* per annum to the testator, but should nevertheless, at the end of the said term, pay the said 1,000*l.* That afterwards *Olley* entered into a bond, bearing even

(1) The statement of this case is taken from the Register and Lord *Hardwicke's* Note-book, the arguments of counsel from his Lordship's Note-book, and the judgment from a manuscript report.

(2) Unless there be collusion between the debtor and the representative of the estate, *Doran v. Simpson*, 4

Ves. 651, or the representative of the estate be insolvent, *Utterson v. Mair*, 2 Ves. jun. 95, and S. C. 4 Bro. C. C. 270, and see *Alsager v. Rowley*, 6 Ves. 748.; or unless he be the surviving partner of the testator's or intestate's estate, *Newland v. Champion*, 1 Ves. 106.

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v.
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TON.

date with the said articles for payment of the said 1,000*l.*, and performance of the articles ; and a judgment was entered up thereon, and *Olley* also signed a note for 800*l.* payable to *Thomas Penny* with interest. That after entering into the said articles, the said trade was carried on and continued in the joint names of the testator and *Olley*, but the profits thereof were solely received by *Olley*. That upon the death of *Samuel Penny* on the 25th September, 1728, *Thomas Penny* the younger was taken into partnership with *Olley*. That from the year 1715 to 1727, there was a running account between *Olley* and the testator, and on the 29th of September 1727, they came to a general account, and mutual memorandums were signed by them to each other, whereby there appeared due to the testator, the sum of 2,896*l.* 5*s.* 9*d.* which *Olley* promised to account for on the 25th December then next. That on the 25th September 1728, they signed a memorandum of their having made a balance of the testator's account, whereby there appeared due to him the sum of 1,901*l.* 5*s.* The bill further alleged, that after stating the said account, all the proceedings in the said trade were carried on in the names of *Olley* and *Thomas Penny* the younger. And the plaintiffs by their bill alleged, that the balance of 1,901*l.* 5*s.* ought to have been paid, but that *Olley* had refused to pay the same.

The defendant *Olley* by his answer admitted the copartnership between him and the testator for several years prior to June 1715, but that the same was dissolved on the 24th of June 1715, when he and the testator settled a general account of the copartnership till the 20th of June 1715, in which the share and interest of the said testator in the copartnership were included, and that upon the balance of that account *Olley* was indebted to the testator 2,261*l.* 3*s.* 1½*d.* That the testator at the time of the articles being entered into, agreed to give up the trade and the whole benefit thereof to *Olley*, and that till December 1727, the testator's name was continued in the trade, but the same was done only lest the same should suffer from leaving out his name, and for no other purpose. And he likewise stated, that from the 24th of June 1715 till the testator's death there was an open account between them, and upon the balance of these accounts, he claimed to be a creditor upon the estate to the amount of 6,005*l.*, but submits to deduct from that sum what might be due to the testator upon the foot of the articles, and said that he was willing that the plaintiffs or their solicitor should inspect his books.

The testator died in 1730, and the executors who are parties to this suit have never attempted to call the defendant *Olley* to an account. On the 10th March 1736, this cause came on to be heard before the *Master of the Rolls* who ordered the bill to be dismissed as against *Olley*, and on the 12th November 1737, it came on before the *Lord Chancellor* upon appeal.

BICKLEY
v.
DORRING-
TON.

Mr. *Attorney-General* for the plaintiffs.

Mr. *Fazakerley* for the defendant *Olley*.

The plaintiffs have not made out any special case of laches against the executors. The testator died in 1730, and the bill was filed in 1733. It is a common direction for the Master to enquire what debts are proper to be put in suit.

LORD CHANCELLOR.—This bill is totally improper as Nov. 12, 1737. against the debtor, and inconsistent with the principles of law and the rules of this court. No action or suit can be brought against a debtor to the estate but by the executor or personal representative of the testator. The whole management of the estate belongs to him. The right of it is vested in him, and cannot be taken from him by creditors or legatees. If he release a demand and is solvent, it is a devastavit in him, and he is personally answerable for the sum released. In cases of collusion or insolvency it may be proper to come here for satisfaction against the debtor; but there must always be some special case which is not attempted either by the bill or at the bar. Many inconveniences would attend this method of proceeding, except in cases particularly circumstanced. The bill must be dismissed but without costs, because it might have been demurred to. (1)

(1) Reg. Lib. A. 1736. fo. 402. Reg. Lib. A. 1737. fo. 56.

DAWSON v. DAWSON. (1)

Nov. 13th, 1737.

LORD CHANCELLOR.—Where a bill is brought for a general account, and the defendant sets forth a stated one, the 1 Atk. 1. Where a defendant sets forth a stated account, it is a bar to a general one till particular errors are assigned.

(1) It appears by the *Lord Chancellor's* note of this case that the bill was filed by one who claimed one sixth of the surplus of a real and personal estate

DAWSON plaintiff must amend his bill. (2) For the stated account is, *primâ facie*, a bar till particular errors are assigned to the stated account. (3)

To support a stated account it is not sufficient to say, that there has been a dividend, which implies an account stated, for a dividend may be made upon a supposition that the estate will amount to so much; but still subject to an account that may be taken afterwards.

under a will against the trustees and those claiming the other shares, and that the trustees insisted upon a stated account, and gave in evidence that a meeting between the plaintiff and all those interested in the estate had taken place; that the account was produced, and no objection was made to it; that they had agreed to divide 12,000*l.*, and that the plaintiff had received 2,000*l.* as his share. Several considerable errors were shewn to exist in the trustees' accounts. His lordship decreed an account, and that if the Master found any account stated, he was not to travel into it. Reg. Lib.

A. 1737. fo. 1720.

(2) So, *Sumner v. Thorpe*, *ante*, p. 11. *Willis v. Jernegan*, 2 Atk. 251.

(3) If a bill be filed to impeach a settled account, specific errors must be alleged, *Taylor v. Haylin*, 2 Bro. Ch. Ca. 310. *Johnson v. Curtis*, 3 Bro. Ch. Ca. 286. *Chambers v. Goldwin*, 9 Ves. 266. *Drew v. Power*, 1 Sch. & Lef. 192, unless a settled account is suggested only, but not proved by the answer, in which case liberty is given to surcharge and falsify, if the Master should find any settled account, *Kinsman v. Barber*, 14 Ves. 579.

THOMAS HOW LYNN Plaintiff; (1)

and

THOMAS KERRIDGE, Executor of
MARY KERRIDGE, the Widow, who
was Executrix of SAMUEL KERRIDGE, the Testator, WILLIAM SPIDAL and SARAH his Wife and Others } Defendants.

Nov. 15th, 1737.

A testator after disposing of his real estate, and giving a general legacy of 100*l.*, gives all his moneys not otherwise by his will disposed of to his younger children, and the residue of his personal estate to his wife. Under the word "moneys," East India stock passes to the children. (2)

(1) This case is taken from Lord Hardwicke's Note-book.

(2) But the word "money" will not pass stock, where the testator in his

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son, *Thomas Kerridge*, and the heirs of his body; and taking notice that his wife was then with child, devised all his leases whatsoever upon trust, that they should preserve the rents as they should arise, for the use of his son *Samuel* and his daughter *Sarah*, and of the child which his wife then went withal (which child was the plaintiff's mother *Mary Lynn*) to be paid them in equal proportions:— to the said *Samuel Kerridge* and the child unborn, if it should be a son, so soon as they should attain their respective ages of twenty-one years; and to his daughter *Sarah* and the child unborn, if it should be a daughter, at their respective ages of twenty-one years or marriage, which should first happen; and after giving a general legacy of 100*l.*, he gave and bequeathed to the said *Samuel*, *Sarah*, and the child unborn, all his monies whatsoever not therein otherwise disposed of; and if any of his said children should die before their shares became payable, the shares of him, her, or them, so dying, should remain to the survivor or survivors of them; and he gave all other his personal estate whatsoever to his wife.

The testator left four children, *Thomas*, his eldest son, *Samuel*, who died an infant, *Sarah*, and *Mary* the unborn child, mentioned in the will.

Mary married *Francis Lynn*, by whom she had issue, the plaintiff.

The testator was possessed of a sum of 767*l.* old East India Stock, the dividends of which, after his death, were carried to the account of the younger children, to which the widow, then the personal representative of the testator, made no objection.

Mary Kerridge died, having, by her will, made her son *Thomas Kerridge*, her executor, who proved her will.

On the 8th October, 1718, *Thomas Kerridge*, by letter of attorney, transferred the East India stock to *Henry Stoakes* and *Mary* his wife.

The prayer of the bill was for a transfer of plaintiff's share of the 767*l.* East India stock.

Mr. *Browne*, for the plaintiff.—The word monies will include this stock, which is credit for so much money in the Company's books, and the word would clearly take in securities for money; bonds and mortgages would certainly

will distinguishes stock from money, And it is said by Lord *Eldon*, stock
Hotham v. Sutton, 15 Ves. 319. *Om-* does not pass by the word "money,"
maney v. Butcher, 1 Turn. Rep. 260. *Hotham v. Sutton*, 15 Ves. 327.

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KERRIDGE. have passed. The words in the act 9 & 10 W. 3. c. 24. s. 182., are estate, interests, and stocks of money, in the said Company. Land will pass by the words rents at such a place. The testator gives all his monies, not otherwise disposed of, but he had not before given any specific money, he must, therefore, have meant all his personal estate, not otherwise disposed of, for he had given a general legacy of 100*l*. The younger children have no other provision except the leases, producing about 120*l. per annum*, and nearly expiring.

Nov. 15, 1737. LORD CHANCELLOR decreed an account and satisfaction for one moiety of the 767*l*. old East India stock against the defendant *Thomas Kerridge*, the executor *nisi*, &c. he making default. (1)

(1) Reg. Lib. B. 1737. fo. 53.

MANNING v. LECHMERE. (1)

Nov. 16th, 1737.

1 Atk. 453. LORD CHANCELLOR.—The rules as to evidence are the same in equity as at law, and if *A.* was not admitted as a witness under that lease.

Where two leases are set up, you cannot read one of them, till you have proved possession under that lease.

To shew a title in the lessor he must prove actual payment of rent, receipts alone will not do.

Bailiffs' rentals are evidence of payments.

(1) The points stated to have been decided by the *Lord Chancellor* in this case, having arisen collaterally to the merits of the cause, are not mentioned in his Lordship's note. The facts of the case, as mentioned in Lord *Hardwicke's* Note-book, were shortly as follows. On the 28th of February, 1695, the defendant's father granted to the plaintiff's father a lease for 99 years of certain lands, at a rent of 60*l. per annum*, and four-pence per ton for minerals dug: covenant by the lessee for the payment of the rent. On the 29th of February, in the same year, articles of partnership were entered into be-

tween the lessor and lessee, for carrying on the iron works, by which it was provided that the profits should be applied, first, to the payment of 40*l. per annum* to *Manning* for his trouble; and, secondly, to the payment of the rent reserved to *Lechmere*. The surplus to be equally divided, with a power to determine the partnership within six months after the end of the first seven years. In 1699, a judgment having been obtained against *Lechmere* for a large sum, some coal at the furnace was taken in execution, after which the works ceased; no rent had been paid since that time, and the plaintiff and his

at the trial there, because materially concerned in interest, the same objection will hold against reading his deposition here.

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There are many cases where leases are granted to persons, in which possession upon that lease, and payment of rent, shall be a presumption of right in the lessor, till a better is shewn; but when two leases are set up, you cannot read one of them, till you have proved possession under that lease.

Receipts for rent are not a sufficient evidence of a title in the lessor, unless he proves actual payment, especially where the person who has signed the receipt is living, for he ought to have been examined in the cause.

Where there are old rentals, and bailiffs have admitted money received by them, these rentals are evidence of the payment, because no other can be had.

father had for many years been out of possession. The defendant having obtained judgment in an action for the arrears of rent, the plaintiff filed a bill for an injunction upon the ground, 1st. That the lessor was not seised of the lands in question at the time of the lease. 2dly. That they were not comprised in the

lease. 3dly. That the lease was made in contemplation of the partnership, and that the partnership had been determined by the default of the lessor.

At the hearing the injunction was dissolved, and the bill dismissed with costs.

WALTER HAYWARD, Son of WALTER HAYWARD and Grandson of the Testator } Plaintiff; (I)

and

JAMES STILLINGFLEET, EDWARD STILLINGFLEET & JOHN FLOYD } Defendants.
 Executor of the Surviving Trustee under the Grandfather's will

Nov. 18th, 1737

1 Atk. 422.
 A testator by his will after declaring his

WALTER HAYWARD, the grandfather of the plaintiff, made his will bearing date the 31st of January, 1680, as follows :
 intention of disposing of all his estate, gives to his three daughters 550*l.* to be paid in four years after his decease. He then devises his lands to trustees for ninety-nine years, upon trust, that if his wife should pay or secure to be paid the 550*l.* in four years; then he gave the inheritance of the lands to his wife for life, and after her decease to his son and his heirs male and female, and for want of such issue to his own right heirs for ever; and desired that his trustees at the request of his wife or son should convey over the term to wait upon the inheritance. This is a conditional limitation in the wife, taking place as an executory devise, and the freehold descended to the son as heir at law to the testator, till the four years were elapsed or his wife had performed the condition, as a part of the inheritance undisposed of; and by this devise the son hath a good estate tail in the inheritance expectant on the determination of the term of ninety-nine years.

“ And for disposing and ordering of all lands, tenements, real and personal estate, which God hath blessed me with, I give and devise as follows. He then gave to his three daughters 550*l.* to be paid in four years after his decease; and directed that the same should be raised and paid out of his lands in *Cranburn*. He then devised those lands to *Stillingfleet*, *Wheeler* and *Floyd* for ninety-nine years, and gave them full power to raise any lesser term or to dispose of the whole term to the uses, intents, and purposes thereafter mentioned; that is to say, if his wife should pay or secure to be paid, the 550*l.* in four years; then he gave the inheritance of the same lands to his wife and her assigns for life, and after her decease he gave and devised the same lands and tenements to his son, *Walter Hayward* and his heirs

(1) Lord *Hardwicke's* judgment in this case, as reported by Mr. *Atkins*, has been compared with the manuscript report of Mr. *Forrester*, and with short heads of the judgment found in Lord *Hardwicke's* Note-book. With both these authorities, as far as they extend,

Mr. *Atkins's* report is found to correspond. It has been therefore adopted with a trifling addition extracted from the latter. The statement of the case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book.

male and female; and for want of such issue to his own right heirs for ever; and he then declared that all the premises so thereby demised to his trustees should attend and wait upon the inheritance; and thereby desired that his said trustees, at the request of his wife or son should convey over the said term of ninety-nine years to wait upon the inheritance; provided always that out of the profits of the said lands his wife should provide for his said son sufficient maintenance and education, otherwise his mind was that his said son immediately after his decease should have one moiety of the said lands for the performance thereof.

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The wife not having paid the money, a bill was filed against *Walter Hayward*, the plaintiff's father, and a decree made for raising the daughters' portions, under which the term of ninety-nine years was sold to *John Lovell* for 650*l.* The 550*l.* was paid, and 49*l.* 13*s.* 4*d.* for the trustees' costs, and the residue was laid out for the benefit of the plaintiff's father, who was then an infant.

The plaintiff's father in October, 1700, attained his age of twenty-one years, and confirmed the conveyance and executed a release to the trustees.

John Lovell, by his will, devised the premises to *George Stillingfleet*, who devised them to his son, the defendant, *James Stillingfleet*, subject to certain trusts, in his will, and made *James Stillingfleet* his executor, who declining to act as executor released the premises to his mother *Jane Stillingfleet*, who proved her husband's will, and by lease and release, dated the 1st and 2nd September, 1720, *Walter Hayward* and *Priscilla*, his wife, (the plaintiff's father and mother) in consideration of 275*l.*, conveyed the inheritance to *Jane Stillingfleet*; and *Walter Hayward* covenanted that he and his wife would levy a fine of the premises to *Jane* and her heirs (1) with other usual covenants. On the 20th June, 1726, *Jane Stillingfleet*, by her will gave the premises to her son, the defendant, *Edward Stillingfleet*.

(1) A covenant to levy a fine by the tenant in tail does not bind the issue in tail. *Saville's case*, cited in *Attorney-General v. Day*, 1 Ves. 224. and in *Hinton v. Hinton*, 2 Ves. 634. *Leech v. Trollop*, 2 Ves. 662. But where tenant in tail makes a conveyance, and

covenants for further assurance, and becomes bankrupt, such covenant binds the lands in the hands of the assignees. *Edwards v. Applebee*, 2 Bro. Ch. Ca. 652 n. *Pye v. Daubuz*, 3 Bro. Ch. Ca. 595.

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This bill was filed by the grandson of the testator claiming the estate as tenant in tail for an assignment of the term of ninety-nine years, for an injunction to stay waste in cutting down timber and for the delivery of deeds and writings belonging to the estate.

Mr. Browne, and Mr. Fazakerley, for the plaintiff.

This is a condition precedent to the mother's estate for life only, and does not extend to the inheritance. The testator clearly intended to dispose of his estate at all events and could not intend to put the estate tail of the son in the power of the wife. No option is given to the son to pay the sum of 550*l.* Therefore the testator must have intended that his estate tail should take effect at all events. If a devise had been made to a monk for life, remainder over, the remainder would have been good.

The sale appears to have been collusive; for 275*l.* only was given for the inheritance of an estate worth 80*l. per annum.* The timber felled is material, as it shews a claim of right; and it is provided that the trustees shall assign over the term, upon the request of the mother or the son which clearly contemplates the event of the mother's not paying the money.

Mr. Attorney-General and Mr. Chute, for the defendants.

As to the felling timber the evidence is very slight. It is not pretended that it sold for more than 30*s.*; and this Court will not entertain a bill for any demand of less than 10*l.* As to the point of law, the testator expressly gives his wife an estate for life out of the inheritance, and not out of the term. This is not properly a condition, but an executory devise. The estate for life and the remainder make but one estate. The plaintiff's claim is against a purchaser for a valuable consideration, claiming under one who in all events, had power to bar the plaintiff by fine, which he covenanted to levy.

LORD CHANCELLOR.—The only question is upon the title, and when that is determined, the decree as to the matters prayed by the bill, will follow of course, and it depends upon the limitations in the will of old *Walter Hayward.*

Nov. 18, 1737. He plainly declares his intention in the beginning, to dispose of his whole estate at all events, after this he gives to his three daughters 550*l.* to be paid out of his lands in *Cranbourn*, and then appoints the manner of raising it, and says, if his wife pay the 550*l.* within four years after his

decease, then he gives her an estate for life, out of the inheritance of his land.

If it be a condition, it is insisted it is annexed to the term for ninety-nine years, and that he intended to give his wife an estate in the term, but I think this cannot be so construed contrary to the words, for though it is awkwardly expressed, yet he meant to carve an estate for life out of the inheritance of the estate, and not out of the term.

The question is, whether the words of payment amount to a condition, or a limitation, and whether a condition precedent or subsequent.

Now I think they cannot create a condition subsequent, for the heir at law to whom an estate tail is after given, must be the person to enter and defeat the condition, because an estate of freehold cannot cease without an entry for a breach of the condition, and here has been no entry, and this would destroy the whole intention of the will, which would not at all serve the plaintiff. If this be a condition at all, it must be a condition precedent; but I think it is not so, because in that case, if there was a breach, no body can take advantage of it but the heir at law, who must enter, and such entry would defeat his subsequent limitation. (2)

Wherever there is a limitation with remainders over, made in the words of a condition, which would be construed as a condition, if they could take effect, it ought to be construed as a limitation, if they cannot.

I am of opinion that this is a conditional limitation in the wife, taking place as an executory devise: for it cannot be a contingent remainder, for that can never depend upon an estate for years, but must have a freehold to support it.

And though this is an executory devise to the wife, which never took effect, yet the estate tail to the son is well limited, and took place. (3)

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(2) See 1 Fearn 406, *et seq.* 4th edit.

(3) Where a remainder or executory limitation is devised, to take effect on a condition annexed to a preceding estate, and that preceding estate fails, the remainder over, or executory limitation will nevertheless take place, *Jones v. Westcombe*, 1 Eq. Ab. 245. *Hopkins v. Hopkins*, Ca. temp. Talb. 44. *Andrews v. Fulham*, 2 Str. 1092. 1 Ves. 421. 1 Wils. 107. 3 Burr. 1624. *Guliver v. Wicket*, 1 Wils. 105. 2 Str. 1093.

1 Ves. 421. *Wigge v. Wigge*, 1 Atk. 382. and post *Fonnereau v. Fonnereau*, 3 Atk. 315. *Avelyn v. Ward*, 1 Ves. 420. *Bradford v. Foley*, Doug. 63. *Statham v. Bell*, Cowp. 40. *Horton v. Whitaker*, 1 Durn. & East. 340. *Doe v. Brabant*, 3 Bro. Ch. Ca. 393. *Brown v. Higgs*, 4 Ves. 718. S. C. 5 Ves. 495. and 8 Ves. 561. And the same rule prevails as to personal estate, see *Pearsall v. Simpson*, 15 Ves. 29. *Meadows v. Parry*, 1 Ves. & Bea. 124.

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FLEET.

The case of *Scattergood v. Edge*, 1 Salk. 229. is in point.

This being an executory devise, the freehold descended to the son as heir at law to the testator, till the four years were elapsed, or his wife had performed the condition, as a part of the inheritance undisposed of. (4) At the end of the four years, the remainders vested, and where an estate vests by descent, it can never devest again.

It has been insisted upon for the defendant, that this is a very hard case against him who claims under a purchaser for valuable consideration, but if it is a purchase of an estate with notice of the title, it takes off from the hardship.

It has been objected too, that the plaintiff comes too early, but though he cannot enter during the term, yet he may apply to this Court to preserve the inheritance.

A surrender of the term would not be proper, because it is not merely in the nature of a security, but an absolute power in the trustees to sell the estate for raising the daughter's portions.

Upon the whole, I think by this devise, the son has a good estate tail in the inheritance, expectant on the determination of the term of ninety-nine years.

Therefore his Lordship declared that the plaintiff was entitled to the inheritance of the said estate in remainder expectant on the said term of ninety-nine years, and decreed a perpetual injunction be awarded to restrain the defendants against committing any waste, and that the defendants produce before the Master all deeds and writings relating to the said estate, except such as relate to the said term, there to remain for the benefit of all parties, and gave no costs on either side. (5)

(4) So *Pay's* case, Cro. Eliz. 878. *Gore v. Gore*, 2 P. Wms. 28. *Hopkins v. Hopkins*, Ca. temp. Talb. 44. *Trevanion v. Vivian*, 2 Ves. 430. *Bullock v. Stones*, 2 Ves. 521. *Attorney-General v. Bowyer*, 3 Ves. 725.

(5) Reg. Lib. A. 1737. fol. 272.

RAMKISSENSEAT *v.* BARKER and Others. (1)

November 24th, 1737.

It came on upon the joint pleas of the widow, and the son of the late Mr. *Barker*, governor of *Patna*, in the *East Indies*, who had in his lifetime employed the plaintiff in private trade, as his banyan, or broker: they being made defendants to a bill brought against them as the representatives of *Barker* for an account; it was pleaded that the plaintiff was an alien born, and an alien infidel, not of the Christian faith, and upon a cross-bill incapable of being examined upon oath, and therefore disqualified from suing here.

LORD CHANCELLOR said, as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this Court; and over-ruled the defendants' plea, without hearing one counsel of either side.

1 Atk. 51.
A bill brought for an account against the representatives of an *East India* Governor, who pleaded that the plaintiff was an alien born, and an alien infidel, and could have no suit here. The plea over-ruled; for being a mere personal demand, the plaintiff being an alien infidel, may

bring a bill in this Court.

(1) This case is taken from *Atkyns*. It is not to be found in Lord *Hardwicke's* Note-book.

MICHAELMAS TERM, 1737.

MORGAN *v.* ———. (1)

A BILL was brought for a legacy in the Court of Equity in *Brecknock*, in *Wales*, before the *Welch* Judges at the assize, and the legacy decreed to be paid; the defendant appealed from the decree to the House of Lords, and insisted there was an omission in the decree; for notwithstanding an account was directed to be taken, yet it was not ordered that

1 Atk. 408.

An original independent decree may be had in this Court, where all the facts are stated by the bill, notwithstanding a former decree for the same matter in *Wales*.

for the same matter in *Wales*.

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.

MORGAN
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all just allowances should be made in such account to the defendant: upon the appeal, the decree, as to the payment of the legacy, was affirmed, but varied as to the just allowances; and the House of Lords ordered their decree to be carried into execution by the Court in *Wales*.

The defendant afterwards fled, to avoid the execution of the decree, into *England*; and the bill now brought, sets forth the will by which the legacy was given, and the proceedings and decree in *Wales*, and the appeal to the House of Lords, and their decree, and that the defendant had, to avoid the decree and payment of the money, fled into *England* out of the reach of the process of the Court in *Wales*.

To this bill the defendant demurred, and for cause shewed that it appeared the plaintiff had obtained a proper and complete decree; and that this Court always refused to assist the decree of an inferior court.

On the other hand it was said, that an action of debt will lie upon a judgment, in an inferior court, in the court of King's Bench or court of Common Pleas.

LORD CHANCELLOR was inclined to over-rule the demurrer, and said, that the bill having stated the will, and all the proceedings in *Wales*, &c. for the recovery of the legacy, an original independent decree might be had in this Court for the legacy, but would not absolutely determine it now; and therefore reserved the consideration of the demurrer till the hearing of the cause.

RIVERS'S CASE. (1)

A TESTATOR, by his will, gives an equal share of his real estate (which shall be his due, when the said estate shall be sold) to his two sons *James* and *Charles Rivers*. 1 Atk. 410.

Though bastards strictly are not sons, yet, if they

have acquired that name by reputation, in common parlance they are; though a person's name be mistaken in a devise, yet if made out by averment to be the person meant, the devise to him is good. (2)

LORD CHANCELLOR.—First question, Whether, as it appears that *James* and *Charles* are illegitimate children of the testator, this is such a description of their persons as will entitle them to take under the will.

In the case of a devise, any thing that amounts to a *designatio personæ* is sufficient, and though in strictness they are not his sons; yet, if they have acquired that name by reputation, in common parlance they are to be considered as such.

It has been said, the testator has likewise made a mistake in their names, and therefore they cannot take; but the law is otherwise, for if a man is mistaken in a devise, yet if a person is clearly made out by averment to be the

(1) This case is taken from *Atkins*. It does not appear in Lord *Hardwicke's* Note-book.

(2) And illegitimate children, born and reputed as such, before the date of the will, may take as a *class*, under the general description of children, *Metham v. Duke of Devon*, 1 P. Wms. 529. *Wilkinson v. Adam*, 1 V. & B. 422. But a bastard cannot take as the issue of a *particular person*, until it has acquired the reputation of being the child of that person; which cannot be before its birth, *Earle v. Wilson*, 17 Ves. 528. If the bequest however, had been to the natural child of which a particular woman was *enceinte*, without reference to any person as the father, there would be no uncertainty in that bequest; and probably it would be held good, dict. per Sir William Grant, ib. 532.

The description of son or child means *primâ facie* legitimate son, &c. and all

the cases from the passage in Lord Coke (Co. Lit. 3 b.) establishing that a bastard may take by purchase, if sufficiently described, mean no more than he must make that out, upon the will itself, dict. per Lord Eldon, *Wilkinson v. Adam*, 1 V. & B. 466. See *Vanderzee v. Aclom*, 4 Ves. 771. *Cartwright v. Vawdry*, 5 Ves. 530. *Godfrey v. Davis*, 6 Ves. 43. *Kenebel v. Scrifton*, 2 East, 530. *Hercy v. Birch*, 9 Ves. 357., and see *Beachcroft v. Beachcroft*, 1 Mad. 430. *Bayley v. Snelham*, 1 S. & S. 78.; except where it arises, *ex necessitate*, that the testator must mean natural children, there being no other children, who could by possibility answer the description contained in the will; the parent of such children being dead at the date of the will without ever having had any legitimate children, *Woodhouselee v. Dalrymple*, 2 Mer. Rep. 419.

RIVERS'S
CASE.

person meant, and there can be no other to whom it may be applied; the devise to him is good.

The second question is, What interest in the estate devised *James* and *Charles Rivers* take by this will? The words an equal share of my real estate, must mean in equal shares, share and share alike, or it cannot be made sensible. And these words can be no further extended than to the surplus due to the testator from that estate which was to be sold, and will not reach to any other estate.

The BAILIFF and BURGESSES of IL-
CHESTER, JOHN WINTER, WIL-
LIAM CLEMENT, and THOMAS
LOCKYER, Executors of JOHN WIN-
TER } Exceptants; (1)
and
HENRY BENDISHE Respondent.

November 26th, 1737.

2 Eq. Ca. Ab.
200.

Where a commission of charitable uses was directed to commissioners to enquire by twelve lawful men of the borough of *Ilchester*, in the county of *Somerset*, concerning any appointments to or abuses of any charities within the said borough; held that the commission was well awarded, for the statute did not oblige the Chancellor to issue such commission for entire counties alone. That the direction to the jury of the county instead of being to the jury of the body of the county, was good; and that they might inquire respecting lands lying out of the town, in the county at large.

(1) This case is taken from *Equity Cases Abridged*. The note at the end of the case from *Lord Hardwicke's Note-book*.

LORD CHANCELLOR.—The first objection is grounded on the words of the act, 43 Eliz. c. 4. which says, *Inquiry shall be made by twelve lawful men of the county*; and the objection supposes that it is absolutely necessary that every such commission should be for the whole county; but I can see no foundation for it, the statute does not fix the extent; but only the objects of every such commission. Had the legislature defined the bounds of those authorities, they must have pursued the directions of the act; but as it has not, I do not see any reason to find fault with such a limited commission as this is. As to precedents, there are some produced, viz. eight instances of such commissions between the 1st of Jac. and the 7th of Car. for separate places; and if the words of the act had been stronger, after such a series of precedents, I think it ought not now to be made a question, whether those were called commissions. *A series of precedents against the plain words of an Act of Parliament have made a law*, as in the case of *Bewdley*, 13th of Ann. which was a *scire facias* to repeal letters patent, the *venire fu.* was awarded *de vicineto*, and there was no doubt but that (it being a private suit of the crown to repeal its own grant) the case came within the statute; and the King was bound by the act, as being a remedial law. But upon producing precedents in the Exchequer, in civil suits of the Crown, where the *venire* had been so awarded, after the 4th and 5th of Ann. c. 16., though they had passed *sub silentio*, yet all the judges at Serjeant's Inn Hall were of opinion, that such a series of precedents had cured the mistake. As to the other objection, that the authority to summon the jury is too confined, and should have been from the body of the county, what is said relating to the 4th and 5th of Ann. c. 16., can have no weight; that statute concerning issues only to be tried in actions out of the Courts of Record, at *Westminster*; this is only an inquest awaked by Act of Parliament, and what arises from the 43d of Eliz. that the inquest shall be by men of the county, is answered by the commission itself, viz. Twelve men of the said borough, in the county of S. And this objection as well as the former, is answered by the precedents in all such limited commissions. But it is said, that it appears by the return, this jury which came out of the town hath enquired about lands lying out of the town, in the county at large; the answer is, that such lands concerning such charities founded within the town, and the jury summoned under

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BAILIFF OF this commission might as well enquire into lands out of the
ILCHESTER town, as juries in general commissions for counties en-
v.quire about lands lying in different counties that are an-
BENDISHE.nexed to charities founded within the limits of those coun-
ties through which their commissions extended; and this
is done daily, so I think their commission is good, and
properly executed, and the exceptions must be over-
ruled. (1)

(1) The following Note respecting this Case appears in Lord *Hardwicke's* Note-book.

BAILIFF and BURGESSES OF ILCHESTER and Others . Exceptants;
and
HENRY BENDISHE Respondent.

November 26th, 1737.

This case first came on on the 6th of July, 1737, upon exceptions to a decree of commissioners of charitable uses, when a question having arisen, whether the commission had been properly awarded; it was adjourned till the next term, and precedents were ordered to be produced relating to the form of the commission, and the direction from whence the jury should come.

[In the *Lord Chancellor's* Note-book, under date of the 26th of November, 1737, is the following memorandum:—]

This cause coming on again the respondent produced eight or nine precedents of commissions of charitable uses to enquire for particular towns or boroughs within counties from the reign of King Charles First to King James Second inclusive, whereby the commissioners were directed to enquire by the oaths of twelve good and lawful men of the said town or borough in the county aforesaid, and no precedents were produced for the exceptants; but the exceptants' counsel admitted that those were all the precedents on record of such commissions to enquire of charita-

ble uses within particular towns or boroughs and not for counties at large.

Whereupon I was of opinion that the commission was well awarded and right in substance, for that the statute did not oblige the Chancellor to issue such commissions only for entire counties, the words being in any part or parts of the kingdom; and though the words relating to the jury were of the county, that did not necessarily import of the body of the county, but might be construed according to the rule of the common law as it then stood, *de vicineto*; and if the words had been more strict, yet the precedents produced would have made the law, being all the precedents in this case, and none to the contrary. And for this I likened it to the case of the style of the Great Sessions, in *Wales*, 4 Inst. 240., and of the bailiff and burgesses of *Bewdley*, Mich. 11 Ann. B. R., on the award of a *venire facias*, and I overruled the exception. On hearing the merits of the exceptions, I overruled some of them, but allowed most of them, and varied the decree of the commissioners.

WILLIAM WRIGHTSON and Others,
Executors and Trustees of the Will of } Plaintiffs; (1)
SIR LAWRENCE ANDERTON . . }

and

The ATTORNEY-GENERAL, MARY }
BLUNDELL, the Sister, ROBERT }
BLUNDELL, a Devisee, FRANCIS } Defendants.
ANDERTON, the Brother and Heir at }
Law, and THOMAS FORTESCUE, the }
Residuary Legatee of SIR LAW- }
RENCE ANDERTON }

CHRISTOPHER TILSON, a Purchaser }
of part of the Estate from SIR LAW- } Plaintiff;
RENCE ANDERTON }

and

All the Parties to the Original Cause . Defendants.

THOMAS FORTESCUE Plaintiff;

and

All the Parties to the Original Cause, and }
CHRISTOPHER TILSON } Defendants.

December 5th, 1737.

SIR LAWRENCE ANDERTON, by his will, bearing date the 27th of December, 1723, devised his real and personal estate to his trustees, upon trust to raise money by sale or mortgage, to pay and perform all his debts and contracts by him then or thereafter to be entered into, contracted, or estate to trustees to raise money by sale or mortgage, to pay and perform his debts and contracts; and by a codicil, directs his trustees, after payment of his debts and legacies, to settle the whole estate upon the children of his brother *Francis Anderton*, and their issue, and by a second codicil, he gives his personal estate to *Thomas Fortescue*, and directs that his debts, legacies, and funeral expences, shall be paid out of the money to be raised by the mortgage and sale of his real estate; *Francis Anderton*, who was his heir, had been attainted of high treason, and was unmarried; held, that the Crown, subject to the payment of the interest of the debts, was entitled to the rents and profits of the devised estate, until a son of *Francis Anderton* shall come in esse; and that the personal estate bequeathed to *Thomas Fortescue* was exempt from the payment of debts and legacies; and that *Thomas Fortescue* had a right to insist upon the execution of the contract, though the purchaser and trustees had agreed to abandon it, subject however to the contract being set aside, if it should turn out that a considerable part of the estate were leasehold, or creditors being concerned, if it should turn out upon inquiry that the consideration was very inadequate.

Sir L. Anderton having entered into a contract for the sale of part of his real estates, by will devises his real and personal

(1) The statement of this case is taken from *Lord Hardwicke's* Note-book, the language of the judgment from *Mr. Forrester's* manuscript.

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made; and after giving some legacies, he willed that his trustees, after payment of his debts, and performance of his contracts, should pay such other legacies as he should by codicil or other deed direct, and the residue of his real and personal estate, he devised and bequeathed to his said trustees, and their heirs and assigns for ever, to be divided amongst them in four equal parts, and no benefit of survivorship to be taken by either of them.

By a codicil dated 18th of January, 1723, after reciting the devise to the trustees, and after his giving them 100*l.* each, after payment of his debts and legacies, he directed his trustees to settle his whole estate upon the children of his brother *Francis Anderton*, and their issue, and in default thereof, upon *Robert Blundell*, the son of his niece, and his issue-male, and in default thereof, upon any male issue of his said niece, and he desired that the executors before the making any settlement, should pay certain legacies therein mentioned, to be paid one year after his decease.

By another codicil dated the 3rd of September, 1724, he gave his personal estate to the plaintiff, *Thomas Fortescue*, and directed that his debts, legacies, and funeral charges should be paid out of the money to be raised out of the mortgage and sale of his real estate.

By articles of agreement dated the 8th of June, 1724, and which were executed by the parties, after reciting that the lands were of the annual value of 230*l.*, Sir *Lawrence Anderton* covenanted with the plaintiff *Tilson*, that he would before the 25th March then next, convey and assure to the plaintiff and his heirs, the manor of *Lestoch*, free from incumbrances, except leases of tenants, and plaintiff covenanted to pay Sir *L. Anderton*, his heirs and assigns, 4,600*l.* at the time of executing the conveyances. Before the execution of the articles, a memorandum was made in the words following:—all the timber, except what shall be necessary for common botes and repairs, to be valued by two indifferent persons, which is to be paid for over and above the purchase-money, and in case the estate shall appear to be of a greater or less value than 230*l. per ann.*, then either party is to make allowances for the same in proportion to the sum above mentioned.

The testator died on the 4th of October, 1724, before the purchase was completed; his heir at law, *Francis Anderton*, had been attainted of high treason, and was unmarried. *Thomas Fortescue*, his residuary legatee, was a creditor to the amount of 200*l.*

The original bill prayed the execution of the trusts of the will. WRIGHTSON
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The bill by *Tilson*, prayed a specific performance of the contract, and certain allowances on account of part of the premises being leasehold, and of incumbrances affecting it; but having at the hearing, proposed to abandon the contract upon being repaid his purchase-money, with interest, the proposal was accepted by the trustees, who had resisted the purchase, on the ground of inadequacy of price.

The bill by *Fortescue* prayed an account of the personal estate, that the debts and legacies might be paid out of the real estate, and that the contract with *Tilson* might be carried into effect, and that the purchase-money might be considered as part of the personal estate.

Mr. *Hamilton* was counsel for the plaintiffs in the original cause. Mr. *Mills*, for Mr. *Tilson*. Mr. *Wilbraham*, for Mr. *Fortescue*. Mr. *Chute*, and Mr. *Fazakerley*, for the devisees of the real estate, and Mr. *Attorney-General*, for the Crown.

The questions were,—1st, Whether *Fortescue* was entitled to the whole personal estate, and the debts, &c. to be paid out of the real estate.

2dly, Whether *Tilson's* purchase-money was to be considered as part of the personal estate, and go to *Fortescue*, or to be applied in part payment of the debts.

3dly, Whether *Fortescue* had a right to insist upon the contract being carried into execution, although the purchaser and trustees agreed to abandon it.

4thly, Whether the Crown was entitled to the rents and profits, until a son of *Francis Anderton* should come in *esse*, as part of the estate undisposed of by the will, such son taking by way of executory devise, or the trustees under the devise to them for payment of debts.

5thly, Whether *Fortescue*, the residuary legatee of the personalty could insist upon payment out of the real estate of the debt due to him.

To shew that the residuary bequest was to be considered as a satisfaction of the debt, *Blandy v. Widmore*, 2 Vern. 709. *Smith v. Duffield*, 2 Vern. 177, 258. *Lingen v. Souray*, Prec. in Ch. 400. *Lechmere v. Lechmere*, Ca. temp. Talb. 92. *Kemp v. Kemp*, 2 Ch. Ca. 63., were cited.

LORD CHANCELLOR.—I think it is plain that the testator intended this as a specific bequest of his personal estate. He Dec. 15, 1737.

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has charged all his debts upon his real estate, and has created a trust for that purpose.

As to the second question, In many cases where a man by his will directs a thing to be done, and afterwards does it himself in his lifetime, it shall in equity be considered as a satisfaction, as where a legacy is given for a portion, *Lechmere v. Lechmere*, Ca. temp. Talb. 92.; but it is unnecessary for me to decide this point in the present case, until it be ascertained whether these articles are to be carried into execution or not, and this depends upon the 3rd question. As to which, as these articles affect the interest of a third person, the devisee of the personal estate, I am of opinion that the agreement between the trustees and the vendee to waive them, cannot affect him. But objections have been made to the articles themselves. It has been urged, that there is no counterpart, and that the date is written upon an erasure; but I do not think that these objections are of sufficient weight, as it is clearly proved that these articles were executed by the testator. It has been objected, that the consideration is very inadequate, and that twenty years purchase only is given for this estate. In this respect the present case resembles that of the Duke of Wharton, in which articles were set aside by the *Master of the Rolls*, on behalf of the creditors of the Duke of Wharton's estate, although the Duke submitted to execute them. The same reason applies in this case; I will, therefore, direct an enquiry into the consideration. It appears too, that of this estate, which was sold as fee simple, a part is in fact leasehold, and the purchaser does not insist upon going on. If the leasehold is considerable, it will make an alteration, and will be a reason for setting aside the purchase; these points must, therefore, be enquired into.

As to the fourth question, the Crown must be considered in the same light with the heir at law. The money is directed to be raised by sale or mortgage expressly, and not by perception of the profits, and the trustees are directed to convey to the first son, after the debts are paid. The interest of the debts must, therefore, be charged on the Crown, which will be entitled to the overplus profits. The principal must be charged on the devisee's interest, when he comes *in esse*.

As to the last question, the consideration of it must be reserved until after the accounts have been taken.

By the decree, it was declared that *Thomas Fortescue* was entitled to the personal estate of the said testator, Sir *Lawrence Anderton* as a specific legacy, exempt from the payment of his debts, funeral expences, and legacies; and after reciting that the articles had at the hearing been waived by the vendee and trustees, but were insisted upon by Mr. *Fortescue*, in order to increase the personal estate, the Master was directed to enquire whether the articles were fairly entered into, and whether the consideration was adequate, and what part of the estate was leasehold, and what part of the consideration-money was paid or satisfied by the said Mr. *Tilson*, and all directions as to the execution of the contract, and the application of the purchase-money, in case the same should be carried into execution, were reserved.

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The Crown was declared to be entitled to all profits of the estate above the interest of the debts, until the defendant *Francis Anderton*, who was attainted of high treason, should have a son born, or should die, and it being uncertain whether there would be occasion for the mortgage or sale of the estate, his Lordship reserved the consideration of that matter until the Master had made his report of the debts and legacies, and touching the said contract with Mr. *Tilson*.

The consideration was reserved, whether in case the personal estate given to *Fortescue* as a specific legacy, should on an account taken, appear to be equal in value to or more than the debts due to him, the same ought to be deemed a satisfaction of such debts. (1)

(1) Reg. Lib. B. 1737. fol. 367.

HIGHMORE v. MOLLOY. (1)

December 11th, 1737.

LORD CHANCELLOR.—I am inclined to think a pawnbroker within the several statutes concerning bankrupts, and especially within the general words of the 39th clause of the 5th of Geo. 2., the words of which are, "Whereas persons deal-

general word brokers, in the 39th section of the 5th of Geo. 2. Though a man be a public officer, as an exciseman, yet if he will trade, he makes himself subject to the statutes of bankrupts. See Green's Spir. of the Bankrupt Laws, 4th Ed. 5.

1 Atk. 206.

Pawnbrokers within the statutes of bankrupts, and seem particularly included in the

(1) This case is taken from *Atkins*. It is not to be found in Lord *Hardwicke's* Note-book.

HIGHMORE "ing as bankers, brokers, and factors, are frequently in-
v. "trusted with great sums of money, and with goods and
MOLLOY. "effects of very great value belonging to other persons, it
 "is hereby further enacted, that such bankers, brokers, and
 "factors shall be, and hereby are declared to be subject and
 "liable to this, and other the statutes made concerning
 "bankrupts."

For though pawnbrokers are not expressly named, yet the general word brokers is the genus, and all other kinds of brokers the species.

His Lordship said in the same case, though a man be a public officer, as an exciseman, &c. yet, if he will trade, he makes himself subject to the statutes of bankrupts.

NICHOLLS *v.* NICHOLLS. (1)

Dec. 11th, 1737.

1 Atk. 409. **THOUGH** a man is arrested by due process at law, if a wrong use is made of it against the person under such arrest, by obliging him to execute a conveyance, which was never under consideration before, this Court will construe it a duress, and relieve against a conveyance executed under such circumstances.

Though a man is arrested by due process, yet if a wrong use is made of it against him by obliging him to execute a conveyance while under arrest, this Court will relieve. (2)

(1) It appears from Lord *Hardwicke's* Note-book, that in this case there was strong evidence of fraud and actual duress. The estate was expressed to be conveyed in consideration of the party conveying being discharged from the debt for which he had been arrested, and certain other debts, and being furnished for the remainder of his life with meat, washing, lodging,

&c. By the decree it was declared that the conveyance had been obtained by fraud and imposition. Reg. Lib. B. 1737. fo. 508.

(2) See 2 Roll. Abr. 687. *Hinton v. Hinton*, 2 Ves. 635. *Wilkinson v. Stafford*, 1 Ves. jun. 42. *Knight v. Norton*, 3 Leon. 239. *Roy v. Duke of Beaufort*, 2 Atk. 193.

GOODERE v. LAKE. (1)

Dec. 15th, 1737.

WHERE an original note of hand is lost, and a copy of it is offered in evidence to serve any particular purpose in a cause, you must shew sufficient probability to satisfy the Court that the original note was genuine, before you will be allowed to read the copy.

1 Atk. 446.
Where an original note is lost, and a copy of it is offered in evidence, you must shew the original note was genuine, before you will be allowed to read the copy.

(1) This case is taken from *Atkyns*. It does not appear from Lord *Hardwicke's* Note of this case, which came before the Court upon exceptions to the Master's Report, what the objection was to the proof of the Note, but it appears by the Register's Book that the copy of the Note was admitted in evidence. Reg. Lib. A. 1737. fo. 276.

PHILLIPS v. PHILLIPS. (1)

At the Third Seal before Christmas, 1737.

IN an action at law upon the Bribery Act for a penalty of 500*l.* the defendant had been found guilty, and judgment had been given for the plaintiff. The defendant having brought a writ of error, the plaintiff applied to the Court for an original to warrant the judgment.

An original allowed to be filed after a writ of error brought to reverse a judgment in a penal action. The time limited by the statute for bringing a new action having elapsed. (2)

In this application it was objected that the party came too late; that this was an action on a penal statute which is not favoured even in courts of law; that the statute of jeofails does not extend to actions of this nature, although it remedies defects in civil suits; this Court ought not, therefore, to remedy that which the legislature intended should continue to be error.

(1) The report of this case is taken from Mr. *Forrester's* Manuscript. *Burnham*, 3 Lev. 347.; and see *Anon.* 1 P. Wms. 411.; and *Anon.* 3 P. Wms. 314.
(2) So *Beachcroft v. The Hundred of*

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The *Lord Chancellor* granted the motion, saying it was discretionary in the Court; that though this was an action on a penal statute, yet that was no reason why the Court should not assist it after the defendant had been found guilty.

That courts of law were in the habit of assisting penal prosecutions by their discretionary powers in the cases of amendments.

That the statute having appointed prosecutions to be commenced within two years of the offence, and that time being elapsed, the effect of denying this motion would be to grant an indemnity to the crime.

That the revenue of the Crown in this case could not stand in competition with the impunity of an offence of this nature.

BRIDGE v. JOHNSON. (1)

Dec. 17th, 1737.

A bill of review cannot be brought until the decree it seeks to impeach is signed and enrolled; but a party not bound to sign and enrol a decree against

THIS bill was brought to be relieved against an imposition in the sale of a real estate. The defendant pleaded the proceedings and decree in a former suit, in which the same transaction had been in question, but the decree had not been signed and enrolled. The present bill alleged some new circumstances, which were not denied by the defendant's answer.

himself for the purpose of bringing a bill of review, but he may bring a bill in the nature of a supplemental bill, and have the former cause re-heard at the same time. (2)

To the above statement of the case, the *Lord Chancellor* has subjoined the following memorandum in his Note-book.

I thought the plaintiff could not bring a bill of review, the former decree not being signed and enrolled, and that it was hard to put him to sign and enrol a decree against himself. That this bill was to be considered as in the nature of a supplemental bill, and the plaintiff might apply to have the former cause re-heard at the time of hearing this new cause, and have complete directions in both.

(1) This case is taken from Lord Hardwicke's Note-book.

(2) So *Stanhish v. Radley*, 2 Atk. 177.

Therefore ordered that the plea should stand for an answer, with liberty to except, saving the benefit to the hearing of the cause. Reg. Lib. A. 1737. fo. 100.

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HILL v. TURNER. (1)

Dec. 20th, 1737.

THIS was a petition by the mother of the infant for a prohibition or an order to restrain proceedings in the Ecclesiastical Court in a cause for restitution of conjugal rights against an infant, married without the leave of the Court.

1 Atk. 515.

Though this court cannot on petition prohibit the Ecclesiastical Court, yet it

will restrain a person who has married clandestinely a ward of this Court from proceeding in an excommunication against the guardian and against the infant, either for restitution of conjugal rights or alimony.

By a decree of February 1732, in the cause in which the infant was plaintiff, by *Mary Stuart*, his mother and next friend, it was referred to the Master to take an account of the plaintiff's real estate, and to state what was proper to be allowed for his maintenance and education.

On the 20th July 1733, the Master made his report, certifying that the plaintiff was about fourteen years of age, and that 100*l.* a-year for the time to come was a proper allowance.

In October 1735, when the plaintiff was about seventeen years of age, and a ward of this Court, he was seduced by *Sarah Knott*, *Mary Knott*, *Penelope Knott*, and *Martha Dean*, to marry *Mary Knott*. He was taken by them to an ale-house in the liberty of the *Fleet*, and persuaded by them to drink till he was intoxicated, and then was married to *Mary Knott* clandestinely, and without the leave of the Court.

On the 6th November 1735, it was ordered by the Court, that *Mary Knott*, her sister, and *Martha Dean* should stand committed to the prison of the *Fleet* for their contempt. *Mary Knott* continued in the prison of the *Fleet* a considerable time, and was only discharged on payment of costs. On the 31st of March following, an order was made on the Master's report, for placing out the infant as an apprentice to a mer-

(1) The statement of this case, and the arguments of counsel are taken from *Lord Hardwicke's Note-book*. The judgment (which agrees with the decree entered in *Lord Hardwicke's Note-book*) from *Atkyns*.

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chant in *Holland*, and for the payment of 250*l.* for that purpose.

The wife instituted a suit in the Ecclesiastical Court for a restitution of conjugal rights, or for alimony. The petitioner was appointed his curator, and guardian, and pleaded that the infant was under the care of the Court of Chancery, that *Mary*, the pretended wife, had been committed for this clandestine marriage, that the Court had allowed the infant a certain maintenance, and ordered him to be placed out as an apprentice in *Holland*, that he had no place of abode of his own, and no substance wherewith to maintain his wife till of age, and that he was maintained out of the allowance paid to his mother by order of this Court, and which could not be applied to any other use. On the 27th April 1737, the Judge of the Spiritual Court admitted an allegation as to faculties on behalf of *Mary Hill*, setting forth, that the infant, her husband, was possessed of several real estates of the value of 226*l. per annum* at present, and when the leases in being drop, near 600*l.* a-year; and was entitled to personal estate of near 2,000*l.* The minor and guardian were decreed to be cited to give in their answers to the said allegations, and also to the said libel upon oath. And the Judge allotted 10*l.* to the said *Mary Hill* on account of alimony and expences, and decreed a monition against *Mary Stuart* the guardian for payment, and also a monition against the minor to take his wife home.

On the 12th of July following, a decree of excommunication passed against the infant for not taking home his wife, and against the guardian for not paying the 10*l.* for alimony and expences, and the Judge allotted 15*l.* for further alimony and expences, and decreed a monition against *Mary Stuart* for payment; that *Mary Stuart* and the infant plaintiff both presented petitions praying a prohibition, or an order to restrain the proceedings of the Ecclesiastical Court under this decree, and the excommunication against *Mary Stuart* and the infant plaintiff.

Mr. *Fuxakerley* in support of the petition.

The general care of this infant is under the direction of the Court; nothing is allowed to be paid but what is necessary for his maintenance and education. If the guardian were to pay anything for alimony, it would be a misapplication of the infant's money contrary to the order of the Court. She is only in the nature of a receiver; besides she is a feme-covert, and cannot pay unless her husband pleases.

Doctor *Lee* and Mr. *Clarke* for the wife, *Mary Hill*.

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They might have given in an allegation of reasons why the husband should not be decreed to receive his wife, and restore the conjugal rights. There was no such allegation, but only that he was a minor. In Ecclesiastical cases, there is no distinction between majors and minors. It is said that he is a minor and a ward of this Court; but notwithstanding that the marriage is good, Mrs. *Hill* is his wife, and entitled to maintenance. It is said that he is an apprentice in *Holland*, and that he cannot take his wife home; but he was sent to *Holland* only to deprive her of the benefit of her marriage. The rule of the Ecclesiastical Courts as to alimony is, that after issue joined it is granted from the time of the receipt of the citation. The mother and guardian in the consideration of the Ecclesiastical Court stands in the place of the infant, and a feme-covert is in the same state as a feme sole. There is no order for the guardian to pay any money out of her own pocket, but the Court took only that which was allowed, for the maintenance of the wife is the same as the maintenance of the husband. The wife could not apply to this Court. The Ecclesiastical Court alone could afford her redress. To grant a prohibition in this case will be to dissolve the marriage, or at least to suspend it till the infant comes of age.

LORD CHANCELLOR.—I have no doubt at all as to the propriety of applying to this Court; but the misfortune is, the want of a sufficient law to restrain such clandestine marriages, which are not only introductive of great mischiefs, but put Courts of judicature under great difficulties; but, notwithstanding this defect in the law, it is incumbent on this Court to prevent, as far as they can, persons from profiting themselves by such infamous methods. Dec. 20, 1737.

Notwithstanding the wife may have been discharged from the order of commitment, yet, till she has paid the costs of the Court for the contempt, she is still under the authority and jurisdiction of this Court, though she goes at large.

I cannot reverse the sentence which has been pronounced in the Ecclesiastical Court, that can be only done by appeal to the proper Judges, for it cannot be reversed in a summary way; nor can I, upon a petition, grant a prohibition to the Ecclesiastical Court, for that can only be upon shewing they have no jurisdiction, which must be done by motion, and a proper suggestion: besides, there is no colour to say

The sentence of the Ecclesiastical Court cannot be reversed in a summary way, but by appeal only to proper Judges; nor can a prohibition to that Court be

granted upon a petition; by motion and a proper suggestion it may

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An injunction does not deny, but admits the jurisdiction of the Court of common law; and the ground on which it issues is, that they are making use of their jurisdiction contrary to equity. So where a trustee is suing in the Ecclesiastical Court for payment of *cestui que trust's* legacy into his own hands; or in the case of a portion, where the husband is suing for it there, before a settlement made; this Court will, upon the same grounds, restrain them from proceeding.

the Ecclesiastical Courts want jurisdiction, for the authority they exercise in matrimonial cases is the general law of the land, and extends to persons not only of full age, but under, provided they are old enough to contract matrimony.

But the question will be, whether this is not a particular case, and so circumstanced as to give me an authority to restrain the person, without meddling with the jurisdiction of the Ecclesiastical Courts. For an injunction, when awarded, does not deny, but admits the jurisdiction of the Court of common law; and the ground upon which it issues is, that they are making use of their jurisdiction contrary to equity and conscience. The same with regard to the Ecclesiastical Courts, in case of a legacy left in trust, where the trustee is suing for payment into his own hands, the Court will restrain him, out of regard to the interest of the *cestui que trust*; and will do it likewise in the case of a portion devised to a daughter upon marriage, where the husband is suing for it before he has made an adequate settlement. (1)

It is upon this footing I shall proceed, for if I was not to restrain the wife, all the care the Court has exercised, with regard to the estate and person of the infant, would be vain and useless. It has been rightly said, that this Court will not only take care of the infant's maintenance and education, but that he does not marry likewise to his disparagement; and though there is no particular order to restrain, yet the marriage is a contempt of the Court.

The power of this Court over infants resulted back to them again, upon the dissolution of the Court of Wards and Liveries by the 12 Car. 2. c. 24.

This Court hath the care and ordering of infants, and though by act of parliament the Court of Wards had a particular power over them and lunatics, yet in every other respect, the law as to infants continued as before; and as the statute of 12 Car. 2. c. 24. has dissolved the Court of Wards and Liveries, the power of this Court over infants is resulted back to them again. The law of England is favourable to infants; no decree shall be had against them here, but what they may shew cause against when they come of age. This Court will make strangers accountable to infants, in case they take upon them to receive the profits of their estates; this Court can also ascertain the *quantum* of an infant's maintenance, and to whom it shall be paid, and this is conclusive to all parties.

(1) See *Anon. post*, and 1 Atk. 491.

The allegation of faculties is a term in the Ecclesiastical Court, in regard to the ability of an infant to allow alimony, and is according to the quality of the person, and the quantity of the maintenance; it is this makes them Judges of the application of the maintenance, and encroaches upon the jurisdiction of this Court. And for whom have they now interposed? for the benefit of a wife, who has in a scandalous manner inveigled an infant, and stolen him away from this Court; but though I cannot upon a petition prohibit the Ecclesiastical Court, yet I will restrain the wife from proceeding either upon the excommunication pronounced against the infant, or upon the excommunication against the mother, the guardian of the infant; for as there is a certain sum allotted for his maintenance, the guardian is to be considered as very little more than the hand of this Court; for if the guardian applies it to other purposes, it is a misapplication, and she would be liable to the censure of the Court.

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Suppose this woman had even married the infant in a fair way, and with the consent and approbation of friends, still there ought to have been an application to this Court for an increase of maintenance; and I have known such instances: and it is highly improper to institute a suit in the Ecclesiastical Court for that purpose.

Though a ward of the Court is married with the consent of his friends, yet there must be an application here for an increase of maintenance.

His Lordship ordered, that *Mary Hill*, who seduced the infant by ill practices to marry her, whilst he was under the care of this Court, in contempt of the Court, should be restrained from proceeding in the Ecclesiastical Court for payment of alimony against the guardian, and from proceeding therein against the infant, for restitution of conjugal rights, and for alimony, or either of the said causes, till the further order of this Court to the contrary.

And on motion or other application to be made to that Court on behalf of the infant plaintiff, and the said *Mary Stewart* his guardian, or either of them, to absolve them, or either of them, from the sentence or sentences of excommunication awarded against them or either of them in the said suits. It was ordered that *Mary Hill* should consent thereto, in the said spiritual Court, to the end that such sentence or sentences might be effectually removed out of the way. Liberty to either party to apply to this Court for further directions, as they should be advised.(1)

ANONYMOUS.(1)

—
December 21st, 1737.

1 Atk. 19. **A FOREIGNER** in the King of *Prussia's* service applies to the Court, to compel his wife, now residing at *Dantzick*, to deliver up his children, one of fifteen, and another of thirteen years of age, to be educated by him as having a natural right to the care of them. A bill was brought some years ago by the wife, who had then been separated from her husband a considerable time, to have an allowance out of stocks here in *England*, belonging to her, for the maintenance of the children, which was decreed accordingly.

The person of foreigners, subject to the authority of this Court, only, while in *England*; but though their persons are out of the reach of this Court, yet the property they have here in the funds, is under the control of it.

LORD CHANCELLOR.—I have no power over the persons of foreigners any longer than while they are in *England*, for then they owe a local obedience; but as they are now in foreign countries, my authority will not reach them; but though I cannot come at their persons, yet I might lay my hand upon any property they have here in stocks, &c. but as a sum of money has been already ordered out of a fund belonging to the petitioner's wife, for the maintenance of her children, I cannot make any alteration in that order, while the children continue under her custody, for it is given merely upon their account, and not the mother's.

(1) This case is taken from *Atkyns*. It is not to be found in Lord *Hardwicke's* Note-book.

In the Matter of the
EARL of LITCHFIELD and Sir JOHN WILLIAMS.(1)

December 23d, 1737.

LORD LITCHFIELD and Sir John Williams were assignees under a commission of bankrupt; the latter entrusted one *Gurdon*, the clerk of the commission, to receive some of the effects of the bankrupt's, and to pay some of the debts and dividends; no fraud appeared in the assignees, but the clerk afterwards failing, the question upon petition was, If the assignees should make up the clerk's deficiency to the creditors.

the money, the assignee will be liable to make it good to the creditors, unless the body of the creditors in his appointment of the agent.

LORD CHANCELLOR.—This case has been argued from the common rules of equity, relative to necessary acts done by trustees. In many cases trustees shall not be answerable for losses happening from such necessary acts; but this rule does not hold as to persons employed by trustees, but only to the acts of trustees themselves.

Where assignees under a commission of bankrupt employ an agent to receive money, or pay, and he abuses this confidence; I will not lay it down as a general rule, but at present I am at a loss to distinguish such assignees from any other trustee, employing any agent without the consent of his *cestui que trust*. In which case if his agent deceive him, *respondeat superior* to the *cestui que trust*; so in the present case, as one of the assignees employed the clerk of the commission, a person of very little credit, to pay dividends, who misapplied and embezzled the money, this assignee will be liable to make it good to the creditors, as he did not consult the body of the creditors, who are his *cestui que trusts* in the appointment of this agent. It is no part of the office of the clerk of the commission to receive and pay; he acted solely as agent to the assignees. If it was necessary to have employed some person as receiver it should

1 Atk. 87.

If an assignee under a commission of bankrupt, employ the clerk of the commission, a person of very little credit, to pay dividends, who misapplies and embezzles he consults the

The rule that trustees shall not be accountable for losses which happen from necessary acts does not extend to their agents.

(1) Lord Hardwicke's judgment in this case is principally taken from Mr. Atkyns' Report, but some passages have been added from Mr. Forrester's manuscript, which more fully express his Lordship's meaning.

LITCHFIELD
and
WILLIAMS.

All the Court
can do in a
summary way
under a com-
mission of
bankrupt, is in
transactions
between the
creditors and
assignees, but
will not on pe-
tition determine

have been done by the consent of the creditors. What is the chief consideration of creditors in the choice of assignees? Certainly the ability of the persons, that they may be responsible for the sums they may receive from the bankrupt's estate, by virtue of their assigneeship. If, therefore, they could turn this trust over to another, it would deprive the creditors of the benefit of their choice, and destroy the intent of the law, which has taken so much care to secure to them the right of election. But the negligence of one assignee shall not hurt another joint assignee, when he is not at all privy to any private and personal agreement entered into by his brother assignee. But this I cannot properly determine now; for all the Court can do in a summary way, under a commission of bankrupt, is in transactions only between the creditors and the assignees, but cannot upon petition adjust any demands that one assignee may set up against another concerning a private agreement between themselves, independent of the rest of the creditors.

on private agreements between assignees independent of the creditors.

The money embezzled by the clerk of the commission was 1,000*l*. His bill of fees and disbursements delivered in by him before his death was ordered to be taxed by the commissioners, and what should be found due to him was to be applied towards satisfaction of the money embezzled; and Sir *John Williams*, the representative of the deceased assignee, was to pay in 700*l*., or whatever the sum may be, into the bank, to be added to the residue of *Gurdon's* money after taxation, so as together they may be sufficient to make up the money embezzled by *Gurdon*.

THOMAS NORTON Plaintiff; (1)
 and
 MARK FRECKER, NICHOLAS PAX-
 TON, JOHN LAUGHTON, Executors } Defendants.
 of COLONEL NORTON }

January 24th, 1737.

RICHARD NORTON, the elder, having issue by a former marriage, married a daughter of Lord *Say* and *Sele*, and at that time being seised to him and his heirs, of a church lease in the manor of *Alresford*, for three lives. 1 Atk. 524.

Richard Norton being seised to himself and his heirs of a church lease for three lives, on his second marriage, by a settlement made in 1657, covenants to levy a fine thereof to himself for life, with remainder as to part thereof to the first and other sons of the marriage in tail, and as to other part thereof to the use of such children, and for such estates as he should by deed or will appoint, and for want of such to the use of the first and other sons of the marriage in tail, remainder to his own right heirs. By a settlement made in pursuance of articles upon the marriage of the eldest son of the second marriage, who was a party to the articles, *Richard Norton* the father, conveys it to the uses of his son's marriage settlement: held, that the estate tail created as to part of the premises in the church lease by the deed of 1657, was well barred by the articles and settlement made upon the son's marriage, the church lease not being within the stat. *De Donis*, and that the other part of the premises in the church lease, was in pursuance of the power of appointment contained in the deed of 1657, well appointed by the same articles and settlement, but that at any rate it was not competent for the plaintiff, who was the next in remainder, in case the articles and second settlement had not been made, (having agreed with Colonel *Norton*, his eldest brother by a former marriage, that the lease should be renewed in the name of Colonel *Norton*, in his own name, and in the name of his eldest son,) to bring a bill for an account of the rents and profits which had accrued in Colonel *Norton's* lifetime.

By a settlement of 5 March, 1657, *Richard Norton*, the elder, covenanted to levy a fine of the manor of *Alresford* *inter alia*, to the use of himself for life, remainder to his wife for life, remainder as to *Lanham* farm part thereof to *Richard Norton*, the eldest son of the marriage, and the heirs male of his body, remainder to the second and other sons in tail, and for default of such issue, to the use of such persons as he should by deed or will appoint; and as to *Old Alresford*, to the use of such children by his said wife, and for such estates as he should appoint, and for default of such appointment, to the first and other sons of the marriage in tail, remainder to his own right heirs. There was a proviso

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment where it varies from the Report of Mr. *Atkyns*, is taken from

the manuscript report of Mr. *Forrester*, compared with and corrected by short notes in the handwriting of Lord *Hardwicke*.

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of revocation, with the assent of Lord *Say* and *Sele*, in his lifetime, or with the consent of three other trustees, or the survivor of them after his death, except jointure lands, and for limiting new uses for the benefit of the issue of the marriage.

Upon the marriage of *Richard*, the eldest son of the marriage with *Elizabeth Butler*, a settlement was made bearing date the 4th of October, 1673, to which both *Richard* the father, and *Richard* the son, were parties, whereby after reciting that by articles on the marriage of the son, dated the 26th of September, 1673, to which also the father was a party, it had been agreed that the premises in question should be settled by the father upon the trusts, and for the purposes after mentioned. It was witnessed, that in consideration of the agreement and marriage portion, *Richard Norton*, the elder, bargained, sold, released, and confirmed the said premises to the trustees, and their heirs, upon trust to permit *Richard Norton*, the elder, to receive the profits for his life, then upon trust to permit *Richard Norton*, the younger, to receive the profits for his life, then upon trust, in case *Richard Norton*, the younger, should die without issue male, to raise 4,000*l.* for daughters' portions, and in case the daughters should be otherwise provided for, or *Richard Norton*, the younger, should have no issue, then to pay the rents and profits to such persons as *Richard Norton*, the elder, should appoint, and in default of such appointment, to his heirs, executors, and administrators.

The church lease had been renewed between the periods of the two settlements by *Richard*, the father, in whom the legal estate was vested.

By the second marriage, *Richard Norton*, the elder, had three sons, *Richard*, who died without issue in 1708, *William*, the father of the plaintiff, and *Charles*.

Upon the death of *Richard Norton*, the elder, without making any appointment, *Richard Norton*, the younger, came into possession, and upon his death, Colonel *Norton*, the grandson of *Richard Norton*, the elder, by his first marriage, and his heir at law, took possession, and retained it until his death in 1732.

In 1721, the plaintiff applied to Colonel *Norton*, and requested permission to renew the lease in the name of himself and his son, he paying the fine, which was accordingly done; and in 1722, Colonel *Norton*, by deed, declared the

trusts of the lease to be for himself for life, remainder to the plaintiff for life, remainder to his eldest son.

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The plaintiff denying Colonel *Norton's* right to these premises during his life, by his bill prayed an account of the profits whilst he was in possession, and for satisfaction out of his personal estate.

By an act of parliament of 10 Geo. 2., the executors were prohibited from pleading the statute of Limitations in this suit.

Evidence was produced to shew that the plaintiff had expectations from Colonel *Norton*, and was not aware of his title under the settlement of 1657.

Mr. *Browne*, Serjt. *Barnardiston*, Mr. *Fazakerley*, and Mr. *Noel*, for the plaintiff.

There are two questions,—1st, Whether the plaintiff has any title. 2dly, Whether he has any remedy for the profits.

As to the first, his title under the deed of 1657 is clear; what then has happened to take that title away? For this purpose the deed of 1673 is relied upon; but there was no power of revoking the uses of the former deed without the consent of the trustees, who did not concur in the latter.

It is plain that the settlement of 1657, was concealed from *Richard*, the son. The deed of 1673, does not mention it, and in this latter settlement, *Richard*, the father, who had only an estate for life, is made to convey, although *Richard*, the son, who had a sort of estate tail, might have done it more effectually, for *Richard*, the father, could only act under the power in the settlement of 1657, which is confined to appointing amongst the children of the second marriage.

As to the remedy, the length of time is insisted upon, but the plaintiff's title did not accrue until the death of *Richard*, the eldest son, in 1708; from that time the deed continued in the possession of Colonel *Norton*. The plaintiff was ignorant of his title, and having expectations from Colonel *Norton*, who was his uncle, would have been afraid of offending him.

After the renewal of the lease in 1721, the plaintiff had not the legal title, and from that time Colonel *Norton* may be considered as a trustee for him. Besides the act of parliament may be construed to go a little farther than to prevent the statute of Limitations from being set up, and may be held to remove the objection arising from the length of time. The legislature intended that the case should be determined according to the mere right.

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Mr. *Attorney-General*, for the defendant.

From the accession of the plaintiff's supposed title in 1708, to the renewal of the lease in 1721, there was no claim of title during that time; whatever the plaintiff's title might be, he agreed, that Colonel *Norton* should occupy the premises; but the plaintiff had in fact no title. As to part indeed the limitation is to *Richard Norton*, the younger, and the heirs male of his body; but as to the rest of the manor, it is limited to such children of the marriage as the father should appoint. There was no necessity that *Richard*, the younger, should join in conveying by the deed of 1673, because he had no legal estate, and any equitable interest he might have was sufficiently bound by the articles.

Jan. 25, 1737.

LORD CHANCELLOR.—I am of opinion, that the plaintiff would have been entitled to the manor of *Alresford*, and *Lanham* farm, by virtue of the remainder limited to the first and other sons by the deed of 1657, if nothing had been done subsequent to that to bar his right.

In the case of *Wastneys v. Chappell*, (1) in the House of Lords, 1712, it was determined that in respect to estates thus granted in fee, determinable on lives, a person may take by way of remainder, as a special occupant; but that as such an estate tail is not within the statute *de Donis* nor barrable properly by a recovery as an estate tail, any limitations depending thereupon are entirely in the power of the first taker in tail, and may be destroyed by any conveyance or even articles in equity; and so it was determined in the case of the Duke of *Grafton v. Lord Euston*, (2) in 1722, in which I myself was counsel, the duke being the first person in the settlement who would have been tenant in tail if the property had been an inheritance, was held to have an absolute power over the estate.

The question then is, whether the deed of 1673, amounted to a good disposition. The lease had been renewed between the periods of the two settlements by *Richard*, the father. The whole legal estate was in him; and it was, therefore properly agreed that he should convey. As to

(1) 1 Brown P. C. 457. S. C.

(2) 3 P. Wms. 266. note (E) S. C. So *Forster v. Forster*, 2 Atk. 259, *Saltern v. Saltern*, ib. 376. *Williams v. Jekyl*, 2 Ves. 682. *Blake v. Blake*, 1 Cox 266. *Blake v. Luxton*, Cooper, 178. *Grey v. Mannoch*, 2 Eden. 339.

But a will notwithstanding a dictum of Lord *Kenyon's* to the contrary, in 6 T. R. 392, does not operate as a bar to a quasi estate tail and the limitations over, *Dillon v. Dillon*, 1 Ba. & Be. 95. *Campbell v. Sandys*, 1 Sch. & Lef. 294.

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Lanham farm the settlement is clearly good; for both in that settlement and in the articles the tenant for life and remainderman in tail join in the conveyance. As to the manor of *Alresford*, the tenant for life, with power of appointment, joins with the tenant in tail in default of such appointment. The limitation in the deed of 1657, under which the plaintiff claims, is only in default of an appointment; but here is an appointment which *Richard Norton*, the elder, might make at least, with the consent of the tenant in tail. But if there had been originally any doubt, there can be none after the plaintiff has agreed that *Colonel Norton* shall receive the profits for his life.

There is no pretence for saying that the plaintiff's title was concealed from him, or that he was ignorant of it.

As to the remedy—The plaintiff's bill for an account of rents and profits is improper and premature, the possession never having been recovered against *Richard*, the defendant's ancestor; and in this respect the proceedings in equity are the same as at law, where trespass will not lie for mesne profits till the possession is recovered by ejectment.

Even supposing the Court should now have been of opinion that *Richard*, the heir at law of old *Richard*, had no right and ought to be considered only as a trustee for the plaintiff; yet as he was in possession claiming the estate as his own right, and insisting on his own title, this Court cannot decree an account of rents and profits without having any regard to the recovery of the possession. (1) The bill was dismissed without costs.

N. B.—The *Chancellor* said, in this case no executor was compellable either in law or equity to take advantage of the statute of Limitations against a demand otherwise well founded.

(1) See *Curtis v. Curtis*, 2 Bro. Ch. Ca. 622. *Dormer v. Fortescue*, 3 Atk. 129. *Pulleney v. Warren*, 6 Ves. 73.

THE ATTORNEY-GENERAL v. JEANES. (1)

January 27th, 1737.

1 Atk. 355. It was said by the *Lord Chancellor* in this case, that in an information by the Attorney-General for the regulation of a charity, it is the business of the Court to give a proper direction as to the charity, without any regard at all to the propriety or impropriety of the prayer of the information, and that this case herein differed from all others, wherein the decree must be founded on the prayer of the plaintiff's bill.

(1) This case is taken from *Atkyns*. It appears from Lord *Hardwicke's* note of this case, that the information was for the establishment of a charity for a free school, and that it prayed for the removal of the school-master; that he might pay a sum of 200*l.* in his possession, to be invested in land for the benefit of the school; that the premises might be repaired, and trustees appointed. And it appearing in evidence that the acting trustee had been appointed by a deed executed by one only of two surviving trustees, his Lordship declared that the conveyance of the charity estate being made by one only was not warranted by the deed of trust, and ought therefore to be set aside; and decreed the same accordingly. And that the surviving trustees should proceed to nominate other trustees; and convey the

estate to themselves and such new trustees subject to the trusts of the original deeds; and he directed the 200*l.* to be laid out in land, with the approbation of the Master; and that the defendant *Jeanes* should pay the 200*l.* when a proper purchase could be found; he giving proper security in the mean time; and his Lordship ordered that no fine should be taken on the lease of the charity estate. And as to all other matters the information was dismissed.*

(2) The Court has gone a vast way in relieving against want of form and mistakes in pleading as to charities, per Lord *Eldon*, *Attorney-General v. Jackson*, 11 Ves. 372. *Attorney-General v. Parker*, 1 Ves. 43. *Attorney-General v. Smart*, ib. 72. *Attorney-General v. Scott*, ib. 413. *Attorney-General v. Whiteley*, 11 Ves. 247.

Ex parte THOMAS LAMPREY. (1)

January 27th, 1737.

MR. THOMAS LAMPREY, a chaplain of *Christ Church, Oxford*, having been deprived of his chaplainship by the dean, on account of his marriage, presented a petition to the *Lord Chancellor*, as visitor, complaining of the deprivation and praying to be restored.

Upon a question whether the chaplain of *Christ Church* had been properly deprived by the dean of *Christ*

Church of his chaplainship on account of marriage; it was held that *Christ Church* was both a college or a house of learning, and a cathedral church; and from the chaplains being admitted as members of the college, being prohibited from accepting livings except at a certain distance and of a certain value, and from being obliged to preach in the University, and attend prayers in the *Latia* chapel, and keep exercises in the house, and have servitors allowed them; but inasmuch as they were obliged to read prayers in the choir which has necessary relation to the church, it was held that the chaplains were to be considered members of this society in both its capacities, as well in that of a college as that of a cathedral church. And in the absence of any general statute of the University, or any particular statute relating to the foundation of *Christ Church* as a college, it was held, from the general usage of the Universities of *England* prohibiting fellows from marrying, and from general reputation relating to this foundation, and from particular usage of this society, in like cases, which prohibited students from marrying; that marriage was a lawful cause for a chaplain of *Christ Church* being expelled or removed from his chaplainship.

The question made was, whether the marriage of a chaplain was a sufficient cause to entitle the dean to remove him

The case was argued on the 29th of November and the 21st of December, by Dr. *Lee* and Mr. *Fazakerley*, in support of the petition; and by Doctor *Andrews* and Mr. *Murray*, against it.

On the 27th of January the *Lord Chancellor* delivered the following judgment in Lincoln's Inn Hall.

LORD CHANCELLOR.—There are three questions in this case :—

1st, Whether *Christ Church* be a college or house of learning, or a cathedral church only, or both.

2dly, Admitting that it ought to be considered both as a college and a cathedral church, whether the chaplains are members of this society in the one capacity or the other or in both.

3dly, Whether marriage be a lawful cause for the removal of a chaplain by the dean.

(1) The whole of this judgment is copied from a paper in the hand-writing of Lord Hardwicke.

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Upon the first of these questions I have already given my opinion; and it is clear that *Christ Church* is both a college or house of learning, in the University of *Oxford*, and also a cathedral church, the chapter of the bishop of that see.

As to the second question, the evidence upon it is not so clear and decisive. The chaplains are not mentioned in the charter erecting the bishoprick, nor has any instrument been produced relating to the foundation either of the college or cathedral church, which takes any notice of chaplains.

There is an entry in which mention is made of eight petty canons and eight clerks, and in subsequent entries of the names of the members *ministri in ecclesia* eight, *et clerici* eight, are mentioned; but it does not appear that the chaplains were meant by either of these denominations. The number in both instances is the same, but the name is different, and it hath not been shewn that the chaplains ever received the particular salaries there set down.

As there is this uncertainty in the evidence of this matter, there is room to believe that *Christ Church*, when a mere college or house of learning, before its erection into a cathedral church, might have had chaplains.

It is natural to think so, because many other colleges have, and the statutes of the University take notice of them as members upon the foundation. They are called, indeed, by various names *Capellani*, *Sacellani*, and *Conducts*, in *King's College*, *Trinity College*, and *Catherine Hall*, in *Cambridge*.

And as the college might have had chaplains, it is highly probable that the dean and chapter, upon the erection of the bishoprick, transferred and applied them to be officers or ministers of the cathedral church.

This notion is much favoured by their bearing a name not mentioned in the charter, a name usual and frequent in colleges, but I believe unknown in any cathedral church in *England*, at least I never heard of a chaplain of a cathedral church.

As this appears probable to have been the case originally, so the proof arising from subsequent facts falls in with and supports it.

The admission of a chaplain is as of a member of the college by putting his name in the buttery book. He makes no subscriptions before the bishop, which as a member of a cathedral church merely he would be obliged to do.

The chaplains are prohibited from accepting livings out of

the precincts of the University under certain restrictions as to value and distance, which, as minor canons or members of a cathedral church they could not be; even an act of chapter for that purpose would be void.

They are obliged to preach by turns in the university; and, by the ancient order of 1637, were required to attend five o'clock prayers in the *Latin* chapel.

By a decree of the chapter of 15th May, 1651, those chaplains who are under the degree of Master of Arts, are obliged to keep exercises in the house, as the students are; and they are, by a former decree, allowed a proportionable number of servitors to attend upon them, and are obliged to residence.

All these circumstances indicate a member of a collegiate body bound to academical rules, and have no relation to a cathedral church.

But then it is admitted to be a principal branch of their duty to read prayers in the choir, which has an immediate and necessary relation to the church.

From all these circumstances taken together, I think that the natural inference is, that the chaplains are to be considered as members of this society in both its capacities, as well in that of a college as that of a cathedral church.

But the determination of the two preceding questions will not afford any certain conclusion to determine the third; for admitting a chaplain to be a member of this society in both the capacities I have mentioned, it still remains to be considered,

3dly. Whether marriage be a lawful cause (*causa legitima* are the words of the charter) for the amotion or expulsion of a chaplain, by the dean of *Christ Church*.

Touching this point, there is no general statute of that great collective body of learned societies, the university of *Oxford*; neither is there any particular statute or *lex scripta* of this foundation.

The rule of judging must then be sought for from the particular usage of this society on this or the like occasions, and from the general customs and usages of the Universities of *England* in like cases, which by ancient and approved practice have been received as a kind of *jus commune*, the common law as it were of those societies.

As to the particular usage of this society, strict custom or prescription cannot be pleaded on either side, because the

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foundation is within the time of memory ; but notwithstanding this, it has been rightly admitted by the counsel on both sides, that the usage ought to make a law, otherwise strange confusion would be introduced into both Universities.

It is objected, that there is no ground to insist upon usage in this case, because no instance has been produced of the removal of a chaplain for being married, except that of *Maurice Wheeler*, which is not proved by positive evidence of the fact.

I will consider that instance when I come to observe upon the affidavits, and supposing at present that there is no instance of an expulsion for this cause, it is material to observe, that on the other hand, no instance has been shewn of the appointment or admission of any married man to a chaplainship.

Considering the number of chaplains, and the length of time during which this College has flourished under its last foundation, now near two hundred years, it is almost impossible but that some such instance might have been produced if a person so circumstanced had been taken to be qualified.

But in the proving of usage, even in cases of strict custom or prescription, it is not always absolutely necessary to make positive direct proof of instances exactly parallel.

Instances in other cases of the like sort, general reputation, the opinion of ancient persons, long resident and conversant in the manor or place in question, will be evidence even to a jury in such a case.

Now it appears to me that the instance of students is of the like sort ; and that they cannot enjoy their studentships after being married is plain from the books.

This fact was so much beyond dispute, that the petitioner's counsel in their opening took it for granted, and alleged that there was some decree or act of Chapter to restrain students from marrying ; but no such act is to be found in the books. Consider then how a student appears to be an instance of the like sort with a chaplain.

By the decrees of the Chapter, and in ancient entries, which have been read on both sides, they are generally named together and put under the same regulations ; and as to the distinction, that the students are to be considered as members of the house of learning, and the chaplains of the cathedral church only, it is very remarkable, that in some few instances the students are called students of the church, and the chaplains, chaplains of the house.

There is an order, dated 2d August, 1637, that there shall be thirty servitors, who shall wait upon the students, chaplains, and under commoners of the church. There is another order of the 6th of May, 1650, for the alteration of the prayers, and that this service be performed by the chaplains of the house. And there is an act of Chapter of 30th November, 1660, that all students and chaplains belonging to this church, now absent without leave, do return by such a day.

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It is objected that if any person is admitted of the college, and well proved to enjoy the advantages of it, by taking degrees in the University, he must be subject to the rules and discipline of the house, and yet that he is not restrained from marriage, as in the case of gentlemen commoners, &c.

The answer to this objection is, that such persons are not on the foundation, nor partake of the bounty of the founder; but the chaplains of *Christ Church* are as much upon the foundation, and eat the bread of the founder equally with the students.

Consider in the next place what evidence there is from general reputation, and the opinion of ancient persons long resident and conversant in *Christ Church*.

His Grace the Archbishop of *York* was admitted a student in 1676, now above three score years ago. Dr. *Friend* was admitted a student in 1686, now fifty-one years ago. Dr. *Foulkes* was admitted a student forty-three years ago. And Mr. *Brooks* has executed the office of chapter clerk for fifty-seven years.

All these persons concur, that during all their knowledge, marriage hath always been deemed a sufficient cause for the removal of a chaplain. And my Lord Archbishop adds, that it was the general apprehension of all the members of that society, with whom he conversed during his time, and he never heard it doubted during that time, that a chaplain of *Christ Church*, according to the rules and usages of that society, forfeited his office by marrying.

It cannot be denied but that this would be evidence, and a very considerable evidence to be left to a jury on the trial of a strict custom at law; but this becomes much stronger when it is considered, that here is no evidence on the other side of any reputation or opinion to the contrary.

Mr. *Lamprey* himself does not swear any such thing. Mr. *Baker* and Mr. *Reyner* who come nearest to it, only swear that they never knew or heard of any law or constitu-

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tion of the said church to that purpose; and that may be very true, for it is admitted that there is no formal law or constitution about it.

This general reputation, therefore, stands unimpeached.

But it has been insisted that this general reputation is contrary to usage in fact, for that chaplains have been married, and known to be so, and have not been removed.

This is of great weight, and deserves to be well considered.

On the side of the petitioner four instances have been cited of *Harrison, Ryman, Hutchin, and Baker*.

The most material circumstance is, that they were publicly known, even to the governors of the college, to be married, and yet were not removed.

As to Mr. *Baker*, a particular fact is sworn to, relating to Dr. *Ambridge* and the Dean, but as to the other three, it is only sworn that they lived openly with their wives, which is an analogous expression.

On the other side it is sworn that *Ryman* and *Harrison*, two of the three did not publicly own their wives, and the witnesses swear they believe that the only reason for their not doing so was the fear of being turned out of their chaplainship.

Mr. *Brooks* swears in general, that some of the chaplains have, during his time, been suspected of being married; but that every one of those so suspected, except Mr. *Lamprey*, endeavoured to conceal the same for fear of losing their chaplainships as he verily believes.

This evidence of endeavouring to conceal such marriages, doth, upon consideration, turn the weight of these instances the other way; for it proves that the persons who did it were at the same time conscious that they did wrong, and avowed that they were liable to suffer for it. It amounts in effect to their own confession against themselves.

Connect this with what is sworn by the archbishop of *York* as to the case of *Maurice Wheeler*, and it amounts to a very strong proof. It is true the archbishop does not swear to the fact of removal of his own knowledge, but as he was then informed, and verily believes; but hearsay and belief from ancient persons who are dead (these indeed are not sworn to be so) is good evidence in the case of usage, especially as such removals must be by the act of the dean, and therefore need not be registered any where.

Some deans may have connived at such marriage, but that

is not material, for some persons may lay less weight on such an irregularity than others.

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If the chaplain was a man of merit, or an object of compassion, the dean may have been induced not to enquire into the fact.

It would therefore be very dangerous to admit such instances as a ground of right. It is difficult to say how far that might extend even in the case of fellowships, for I am much afraid that proof as strong, perhaps stronger, might be produced in many colleges.

Sitting as a visitor, I shall be very cautious how I permit such connivances or tenderness to grow up into an evidence of right.

I will take notice in this place of what was said by the counsel for the petitioner, that the argument amounted to a dilemma. Either the chaplains may marry, or the canons cannot; but the canons claim and exercise that right, and therefore the chaplains may do the same.

I think that no consequence can be drawn from the one case to the other.

There seems to me great weight in the argument that the canons are in this house a kind of joint governors with the dean. The dean indeed alone acts with the other heads of houses in the government of the University; for *Christ Church* can there have only a single voice; but the interior domestic government of the society is exercised in Chapter. But the irrefragable answer to this objection is, that the usage is plain and uniform in favour of the Canons, and the Crown, both founder and visitor, of this college, hath from time to time appointed married men to be Canons.

I come now in the last place to consider the general customs and usages of the Universities of *England* in like cases, which, as I said before, have been received as a kind of *jus commune* of those learned bodies.

The two Universities, though distinct in their foundations, and in their rights, have some things common to them both; amongst which that of restraining members upon the foundation of the different colleges (except the governors) from marrying is one.

The fact is certain, and it may have more of curiosity than of use in the present case to enquire into its original.

Probably it may have taken its first rise from the opinion which prevailed before the Reformation, that colleges were ecclesiastical foundations, and therefore fell within the go-

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neral prohibition of marriage which affected all ecclesiastical persons, though there is a fact which may make some think that it had an original more extensive than this, which is, that the faculty fellowships were then subject to the restraint against marriage. Since the Reformation, colleges have been more rightly held to be lay foundations; besides which the churchmen have been restored to their natural liberty of marrying.

But notwithstanding this, the evident utility, nay, almost necessity of the thing has still, by common consent and usage, preserved the restraint as to members of colleges.

It was found necessary, from their being seminaries for the education of youth, the strictness of their maintenance, and the method of a collegiate life.

Upon this foundation it depends in almost all the colleges in *Oxford*, where it is not pretended that there is either any general statute of the University, or any particular statute in the greater part of the colleges against it.

And in *Cambridge*, although they have a statute which says, *nolumus socios esse maritos*, yet it was rather declaratory, than introductive of any new law.

To doubt of this, therefore, because there is no statute or written law against it, would be to unsettle and overturn these foundations.

If this would be the case as to fellows and scholars of a college, how do these chaplains differ. They are equally on the foundation of the college, and in all respects within the same reason, and they are considered on the same foot in the statutes of the University which have been cited, *statutum est quod non graduati quotquot alicujus collegii socii, scholares, capellani, clerici, denique quotquot de fundatione collegii alicujus fuerint studentes insuper ædis Christi*, shall wear such and such habits.

In the statutes of King *Charles* the 1st, there is a declaration who shall be considered as residents, so as to be capable of voting in the election of proctors, *residentes vero interpretamur omnes collegiorum socios, scholares, clericos, capellanos, seu quocunque alio vocabulo in Chartâ fundationis ejusdem nominati et dotati fuerint*.

This function of chaplains is not peculiar to *Christ Church*, but is found in several other colleges, and appears by those statutes to be considered in the same light with other denominations of persons upon the foundation.

Great might be the inconvenience to allow them any

distinction upon the point now in question; but as it is not my business here to make laws, but only to judge of them, I will not enlarge upon that topic.

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But I cannot conclude without making one observation upon the general point whereon so much stress has been laid in this appeal. I mean, that some difference is to be made between several of the members of *Christ Church* and those of the other colleges, in respect of its being a Cathedral Church, as well as a house of learning.

Christ Church has now, for two centuries, under the protection of many successive princes, eminently flourished as a house of learning, and has sent forth many learned and illustrious persons for the service both of church and state; But I am firmly persuaded nothing would tend more to stop this happy progress, and to disturb and unsettle the good government of this society, than to admit of any distinction in point of discipline arising from the mixture of a Cathedral Church in their constitution.

It is impossible to foresee into how many instances the consequences of that reasoning may extend. It is therefore safer to adhere to the ancient foundations and principles which have hitherto prevailed.

Upon the whole I am of opinion that the marriage of the petitioner was a lawful cause of expulsion.

Let his complaint therefore be dismissed.

GREEN, and ROSAMOND his Wife . . Plaintiffs; (1)
and
BELCHIER and Others Defendants.

January 28th, 1737.

UPON the marriage of *Henry Payne*, the Castle Inn at 1 Atk. 505.
Kingston was vested in trustees, upon trust for *Elizabeth* By marriage settlement it is provided, that if husband and wife shall die, leaving issue besides an eldest son unprovided for, then it should be lawful for the trustees to enter upon the estate, and receive all the rents and profits thereof, until they had received 200*l.*; and the estate was afterwards declared to be charged with raising this sum for the use, maintenance and support of such children so unprovided for, in such manner and such proportions as the survivor of the husband and wife should appoint. The wife survived, and appointed the 200*l.* for a daughter, the plaintiff's wife, being a child unprovided for.

Sir *Joseph Jekyll* decreed the 200*l.*, and interest by way of maintenance from the death of the mother. Defendant appealed from that part of the decree which allows interest, and decree affirmed.

(1) The statement of this case is taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*, which corresponds with two Manuscript Reports which have been found, which do not differ in any material respect from that of Mr. *Atkyns*.

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Stint for life, remainder to *Ann Payne*, the mother of *Henry Payne* for life, remainder to *Henry Payne* for life, remainder to *Ann* his intended wife for life, remainder to his first and other sons in tail, "Provided always and upon this condition, That if *Henry Payne* and *Ann* his intended wife shall die, leaving issue besides their eldest son unprovided for, then it shall and may be lawful for the trustees and their heirs, from and after the decease of the said *Henry*, and *Ann* his wife, into and upon the premises to enter and to receive and take all the rents, issues, and profits thereof, so long and until they shall have had and received thereout, and by such means, the sum of 200*l.* for the uses and purposes hereinafter declared," and the premises were afterwards declared to be chargeable, and to stand charged with the raising this sum for the use, maintenance, and support of such children so unprovided for, in such manner and in such proportion as the survivor of the husband or wife should appoint.

The wife having survived her husband, appointed the 200*l.* to be paid to her daughter, the wife of the plaintiff, and the only surviving child of the marriage, who was unprovided for.

The bill was brought by the plaintiff and his wife against the defendant who had purchased the premises for a valuable consideration, but with notice of the plaintiff's claim for payment of the sum of 200*l.* and interest from the death of the mother, who died in 1735. The estate was of the annual value of 50*l.*

The *Master of the Rolls* decreed the principal sum of 200*l.* to be raised, and likewise interest by way of maintenance for the plaintiff's wife from the time of the death of the mother.

From this part of the decree which directed the allowance of interest, the defendant appealed.

Mr. *Chute* and Mr. *Fazakerley* were counsel for the plaintiffs, and the *Attorney General*, Mr. *Browne*, and Mr. *Clarke* for the defendants.

Jan. 28, 1737. LORD CHANCELLOR.—The defendant in this case being a purchaser, with notice of the charge upon the estate, is to be considered in the same light as if the bill had been brought against the person under whom he claims.

The question in this case will be, whether the 200*l.* is to be considered as a sum to be raised by receipt of the annual rents and profits, or as a sum in gross by a determinate time.

It is plain by the settlement, that this 200*l.* was intended

for the children's portions, and what is material too, for such as were otherwise unprovided for; and therefore if no maintenance was allowable in the mean time, the estate not being above 50*l.* *per annum*, the 200*l.* must necessarily be exhausted greatly in bare subsistence for such children, before the whole sum could be raised.

Such a construction, therefore, ought not to be made, unless the words are extremely plain, which is not the present case: That part of the proviso, empowering the trustees to enter and receive the rents, &c. seems to mean the annual rents and profits, though in general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipts of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell; and as a devise of the rents and profits, will at law, pass the lands, the raising by rents and profits is the same as raising by sale.

The subsequent words, by which the premises are declared to be charged with this 200*l.* if they stood alone, would certainly warrant a sale or mortgage, and they ought certainly to have their proper force, and ought not to be controuled by the preceding words, supposing them to mean annual rents only.

The words of the appointment of the 200*l.* being in such manner, and in such proportions, as the survivor of the father and mother shall direct, are very material, for these words not only include a power of raising by mortgage or sale, but a certain determinate time for raising it, and as there is no time limited by the settlement for payment of the money, the father or mother might, no doubt, have made the 200*l.* payable at any time, as at the age of twenty-one, or marriage, and in such case interest by way of maintenance would certainly be allowable in the mean time; it

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Where money is directed to be raised by rents and profits, the Court considers them as equivalent to a direction to sell, (1) as a devise of the rents and profits will, at law, pass the lands.

The appointment of the 200*l.* being in such manner and proportions, as the survivor of the father or mother shall think fit, the father and mother might have made it payable at any time.

(1) Especially in favour of debts and portions, *Trafford v. Ashton*, 1 P. Wms. 415. *Lingen v. Foley*, 2 Ch. Ca. 205. *Mills v. Banks*, 3 P. Wms. 7 & 8. *Gibson v. Rogers*, Amb. 93. *Baines v. Dixon*, 1 Ves. 41. *Allan v. Backhouse*, 2 V. & B. 72., unless there be words to restrain the meaning

to annual rents and profits, *Ivy v. Gilbert*, 2 P. Wms. 13. *Evelyn v. Evelyn*, 2 P. Wms. 673. *Lord Rivers v. Lord Derby*, 2 Vern. 72. *Anon.*, 1 Salk. 367, pl. 2. *Small v. Wing*, 3 Bro. P. C. 503. *Lady Shrewsbury v. Lord Shrewsbury*, 1 Ves. jun. 234.; and see *Okeden v. Okeden*, post.

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Where a legacy is given by a father to a child as a provision, though payable at a future day, yet the child has an immediate right to the interest of the money, (1) otherwise if the legatee be a stranger to the testator.

being a constant rule in equity, that wherever a legacy is given by a father to a child, as a provision for such child, though the legacy be payable at a future day, yet the child has an immediate right to the interest of the money; if the legatee was a stranger to the testator, it would be otherwise. In the case of *Ivy v. Gilbert*, there were no words declaring the premises to be charged with, &c. as in the present, and yet it was held even there, that the words, rents and profits, would in general warrant a sale, though it did not in that particular case, by reason of the subsequent words restraining the manner of raising the money, by leases for one, two, or three lives, or for any number of years determinable thereon, or for twenty-one years absolutely at the old rent. (2)

The decree affirmed.

(1) So *Glide v. Wright*, 1 Ch. Rep. 265. *Harvey v. Harvey*, 2 P. Wms. 21. *Inclendon v. Northcote*, 3 Atk. 438. *Hearle v. Greenbank*, ib. 716. *Coleman v. Seymour*, 1 Ves. 211. *Beckford v. Tobin*, 1 Ves. 308. *Carey v. Brown*, 2 Ch. Ca. 58. But interest is given to children upon the principle that a father shall be presumed to have intended to provide maintenance for his children, until the legacy become payable, *Hearle v. Greenbank*, 3 Atk. 716. *Tyrrell v. Tyrrell*, 4 Ves. 1. *Chambers v. Goldwin*, 11 Ves. 1. *Ellis v. Ellis*, 1 Sch. & Lef. 5. This presumption is rebutted where maintenance is given, *Hearle v. Greenbank*, 3 Atk. 716. *Ellis v. Ellis*, 1 Sch. & Lef. 5. *Long v. Long*, cited in 3 Ves. 286. *Mitchell v. Bower*, 3 Ves. 283. *Wynch v. Wynch*, 1 Cox. 433.; but see *Bourne v. Tynte*, cited 1 P. Wms. 786., which was disapproved of by Lord Hardwicke in *Heath v. Perry*, 3 Atk. 103, and see *Stretch v. Watkins*, 1 Madd. 253. And all the

cases decided are cases of infants; it has *not* been extended by any case to a legacy in favour of an adult, per Sir Thomas Plumer, *Raven v. Waite*, 1 Swan. 558. *Stent v. Robinson*, 12 Ves. 461.; or in favour of grandchildren, though Lord Alvanley in *Crickett v. Dolby*, 3 Ves. 12., was of a different opinion, *Haughton v. Harrison*, 2 Atk. 329. *Butler v. Butler*, 3 Atk. 59. *Elton v. Elton*, 3 Atk. 508. *Perry v. Whitehead*, 6 Ves. 546. *Errington v. Chapman*, 12 Ves. 24.; or of natural children, *Beckford v. Tobin*, D. 1 Ves. 310. *Perry v. Whitehead*, D. 6 Ves. 547. D. per Lord Alvanley, contra, 3 Ves. 12. *Lowndes v. Lowndes*, 15 Ves. 304, unless it can be inferred that the testator intended to place himself *loco parentis*, *De Mazar v. Pybus*, 4 Ves. 647. *Perry v. Whitehead*, D. 6 Ves. 547. *Hill v. Hill*, 3 Ve. & Bea. 183.

(2) Reg. Lib. A. 1736. fol. 379. Reg. Lib. A. 1737. fol. 283.

ELIZABETH CASBURNE and MARY }
 CASBURNE, Infants } Plaintiffs; (1)
 and
 ALEXANDER INGLIS, and ELIZA- }
 BETH SCARFE } Defendants.

January 25th, 1737.

THOMAS CASBURNE having issue three daughters, *Ann*, the late wife of the defendant *Inglis*, and the two plaintiffs; by indenture bearing date the 4th of February, 1725, conveyed sixty acres of land lying in *Cowling*, in *Suffolk*, to the use of himself for life, remainder to his daughter *Ann* in fee. 1 Atk. 603.

and the mortgage is not redeemed during the coverture; this is notwithstanding, such a seisin in the wife, as entitled the husband to be tenant by the curtesy of the mortgaged premises, for in this Court the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor.

Thomas Casburne died in April 1726, leaving his said three daughters, his only issue, him surviving.

Ann Casburne, by lease and release of the 24th and 25th days of June, 1728, in consideration of 900*l.* conveyed to the defendant, *Elizabeth Scarfe*, and her heirs, all the said freehold lands in *Cowling*, subject to a proviso for redemption upon payment of the said sum of 900*l.* and interest.

In August 1729, *Ann Casburne* intermarried with the defendant, *Alexander Inglis*, and died in November 1731, leaving issue by her said husband only one child, a son, who died soon afterwards, without issue.

In 1733, the plaintiffs filed their bill, insisting that they were entitled as heirs at law both to the infant and their sister, to the said premises of sixty acres in *Cowling*, and to certain other premises which had belonged to their father, in part of which their late sister *Ann* had been tenant in tail, and in other part tenant in fee.

The defendant *Inglis*, insisted that having had issue born by his late wife, he was entitled to an estate for life as tenant by the curtesy in all the said premises, and amongst the

(1) The statement of this case is taken from the pleadings; the arguments of counsel, from the *Lord Chancellor's* Note-book; and the judgment verbatim from a manuscript in his Lordship's handwriting.

CASBURN v. INGLIS. rest in the said sixty acres in *Cowling*, subject to the mortgage thereon.

On the 8th of May, 1735, this cause came on to be heard before the *Master of the Rolls*, Sir *Joseph Jekyll*, when his Honor was of opinion, that the defendant, *Alexander Inglis*, was not entitled to the tenancy by the curtesy in the mortgaged premises in question; and decreed him to account for the rents and profits thereof, from the death of his son.

From this decree the defendant, *Alexander Inglis*, appealed, and the cause now came on to be heard before the *Lord Chancellor*, upon the single question, whether the husband was entitled to be tenant by the curtesy of mortgaged lands.

Mr. *Attorney-General*, and Mr. *Browne*, for the plaintiff.

A man cannot be tenant by the curtesy, unless his wife was actually seised, where such seisin can be obtained; a seisin in law is not sufficient. Lord *Coke* says, that there is no tenancy by the curtesy of a bare right, title, use, reversion, or remainder, Co. Litt. s. 35. The statute of Uses recites, that by the invention of uses, men were defeated of their tenancies by the curtesy, and women of their dower. A feme covert is not dowable of a trust. It is true, indeed, that the husband has been held to be tenant by the curtesy of a trust estate; but in that case the *cestui que trust* has the absolute beneficial ownership of the estate, and may limit and entail it as he pleases. In *Penville v. Luscombe*, (2) at the Rolls, 4th February, 1728, his Honor thought that there was no *possessio fratris* of an equity of redemption. In *Reynolds v. Messing*, (3) at the Rolls, 20th February, 1732, and *Robinson v. Tonge* (4) before Lord *King*, in Mich. Term 1730, it was held that a wife was not dowable of the

(2) Lord *Hardwicke* says, "as to the case of *Penville v. Luscombe*, which was mentioned to have been heard at the Rolls, it was a pauper cause, and one question there was, whether there might be a *possessio fratris* of an equity of redemption. I have read over the decretal order in the Register's book, and it concludes, that his Honor declared he would take time to consider of that point before he delivered his opinion; and I cannot find that it was determined, or ever came on again," p. 232 of this case.

(3) In *Dixon v. Saville*, 1 Bro. Ch. Ca. 327., it is said, that the case of *Reynolds v. Messing*, or *Reynolds v. White*, (as it stands in the Register's book) is misrepresented, and does not warrant the point said to be determined by it.

(4) The point here mentioned to have been decided, does not appear in any of the reports of this case, see *Dixon v. Saville*, 1 Bro. Ch. Ca. 326. See 3 Vin. Abr. 145. pl. 28. *Robinson v. Tonge*, 3 P. Wms. 398.

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equity of redemption of a mortgage in fee, *a fortiori* a husband shall not be tenant by the curtesy, for a seisin in law is sufficient to give a woman dower, because without her husband she cannot reduce it into actual possession ; but if the husband omits to obtain seisin in fact, he loses the curtesy by his own laches. So in this case, the husband might, by paying off the money, have obtained actual seisin, or have made the mortgagee a bare trustee for himself ; till that is done, the mortgagee is not merely a trustee. The law requires not only seisin in law, but seisin in fact, where it is possible ; but a mortgagor has not even seisin in law, no actual estate or interest, but merely a right of action, by which upon certain terms, and by certain means, he may recover the estate ; but which in the present case the husband has neglected to do. If a feme whilst sole aliens, with a proviso for re-entry on condition broken, and the condition be broken, and the husband enters not during the coverture, he cannot be tenant by the curtesy, and yet a right of re-entry after condition broken is a higher title than a right of redemption, as it requires nothing but actual entry to complete it ; a mortgagor has no other title than a right of repurchasing upon certain terms, an election which he may or may not exercise. If the husband should be permitted to enjoy this estate, he might by permitting the interest to accumulate exhaust the inheritance.

Mr. *Fazakerley*, and Mr. *Murray*, for the defendant, the husband.

The mortgagor is considered as the owner of the land, subject to a primary charge thereon ; subject to that charge, the mortgagee is only a trustee for the mortgagor, 1 Vent. 141. 1 Vern. 329. *Burnet v. Kynaston*, 2 Vern. 401. *Strode v. Falkland*, ib. 625. *Tabor v. Grover*, ib. 367. *Manning's case*, 8 Co. 96.

An equity of redemption is an estate devisable, descendible, and subject to all legal consequences ; at law a mortgage in fee is a revocation of a will, but in equity no further so than is necessary to make good the mortgage ; a judgment creditor has an equitable lien on an equity of redemption, although no *elegit* can be taken out. Since the statute of Uses, equitable estates have been governed by different rules from what they were before. That statute reciting the inconveniences which had arisen, attempts to remedy them by annexing the possession to the use. This Court has framed trusts upon the same principle, but has

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avoided the inconveniences by adhering to the maxim *æquitas sequitur legem*, it therefore considers a trustee as a mere instrument; upon this ground there is no doubt but that a husband is entitled to the tenancy by the curtesy of a trust estate, 2 Vern. 525, 583, 680. In *Sweetapple v. Bindon*, 2 Vern. 536., it was held that he was entitled to the curtesy in money directed to be laid out in land. The only exception is, the case of a wife who is not entitled to dower out of a trust, *Lady Radnor v. Vendebendy*, Show. P. C. 69.; but that case was so decided to avoid the inconveniences which would have arisen from subjecting estates to dower which had been purchased under the impression that they were not subject thereto; and it is clear, that if a husband was seised in fee, subject to a term in trustees to raise portions, the wife would be dowable if the portions were raised not subject thereto. If the law be so clear as to trust estates, the case of an equity of redemption is stronger. It is a trust, and something more, Chief Baron *Hale*, Hard. 457, 462, says, I conceive that a mortgage is not merely a trust, it is a title in equity, besides there are many things of which the husband shall have the curtesy though the wife cannot be endowed, Co. Litt. 30. It has been said, that the husband ought to have obtained actual seisin by redeeming the mortgage, but that is begging the question, for that could only be necessary in the event of his not being entitled to the curtesy of the equity of redemption. This is compared to a seisin in law, but of an equity of redemption there is no difference between a seisin in law and a seisin in fact. The reason of law on account of which a husband, who by his own laches omits to obtain actual seisin, loses his curtesy, does not apply to this case, Dr. and Student, 172. Co. Litt. 30. In Litt. sect. 52. 40 a, and *Payne's case*, 8 Co. 36., it is laid down that in all cases in which the issue is to make himself heir to the wife, the husband shall be tenant by the curtesy. In *Pen-ville v. Luscombe*, there was no decision about the *possessio fratris*, and in a note of a case in 1716, it is stated that Lord Cowper thought that there might be a *possessio fratris* of an equity of redemption. The supposed injury to the inheritance from the husband's permitting the interest to accumulate, could never happen, because the Court would compel him to keep down the interest.

Mr. Attorney-General, in reply.—I ask no more than that the rule of *æquitas sequitur legem* should be adhered to. If

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the wife had died before the day of payment mentioned in the proviso had arrived, and the heir had paid the money at the day and entered, the husband would not have been tenant by the curtesy. Why then is he to be so of the equity of redemption, which is nothing more than a postponement of the day of payment, and an additional time for the performance of the condition allowed by courts of equity. If a woman purchases an estate and dies before entry, her issue must make himself heir to her, and recover the estate by virtue of that heirship, and yet the husband cannot be tenant by the curtesy.

On the 25th of March, 1738, his Lordship delivered the following judgment.

LORD CHANCELLOR.—The general question in this case is, whether the husband can be tenant by the curtesy of an equity of redemption on a mortgage in fee. This depends upon two considerations: First, *What kind of interest an equity of redemption is in the eye of this court.* Secondly, What is requisite to entitle a husband to be tenant by the curtesy of an equitable interest in land where the wife had not the legal estate.

First, *As to the nature of the interest.* An equity of redemption is considered as an estate in the land. It will descend, may be granted, devised, entailed, and that equitable entail may be barred by a common recovery.

This proves that it is not considered as a mere right, but as such an estate whereof in the consideration of this court there may be a seisin, for without such a seisin a devise could not be good.

The person having the equity of redemption is considered as owner of the land, and the mortgagee is entitled only to retain it as a security or a pledge for a debt. For this reason a mortgage, though in fee, is considered in this court, as personal assets, and shall go to the executor, notwithstanding that the legal estate vests in the heir in point of law. The husband of a feme mortgagee shall not be tenant by the curtesy of the mortgage, unless the mortgage be foreclosed, by which it ceases to be a pledge. It shall not pass by a devise of all his lands, tenements, and hereditaments. (1)

(1) The beneficial interest in a mortgage which is only the money due upon a mortgage will not pass under words which are only applicable to the trans-

fer of real property, unless the testator has no other lands to answer the description in the will than those in mortgage to him, *Clarke v. Abbott, Barr.*

CASBURN v. INGLIS. This was unanimously resolved by Lord Couper, assisted by Lord C. J. Trevor and Mr. J. Tracey, in the case of *Litton v. Falkland*, 2 Vern. 625.

The words are, it was unanimously agreed, 1st, That mortgages in fee, although forfeited when the will was made, did not pass by the general words; although he afterwards foreclosed those mortgages, or obtained a release of the equity of redemption, they should not pass by the will, but go to the heir at law. This shews that the release of the

457.; and notwithstanding it was said by Lord Thurlow, in *Pickering v. Fowles*, 1 Bro. C. C. 197., "that if a man has estates of his own and also has pure trusts and gives the residue by will, only his own estates will pass by the residuary clause;" and in *The Attorney-General v. Buller*, 5 Ves. 340., it was held by Lord Rosslyn that by a devise "of all the rest of my real estate, right, property, and interest therein, in law or equity," to his sons, a trust estate did not pass; it seems now to be settled that, by a devise in general terms a trust estate will pass, unless from expressions in the will or from the purposes or objects of the testator a contrary intention can be inferred, *Lord Braybrooke v. Inskip*, 8 Ves. 417. Thus where a testator devised, "all his real estates whatsoever and wheresoever, unto his wife, her heirs and assigns, for ever; and gave her all his personal estate whatsoever and wheresoever," it was held by Lord Eldon, in affirming the judgment of *The Master of the Rolls*, that trust estates passed, *ibid.*; and it is stated by Lord Eldon that Lord Kenyon in *Roe d. Reade v. Reade*, 8 T. R. 122., said that under a dry naked devise of all his estates, a trust estate would pass; and in the same case Lord Eldon stated that upon consultation with Lord Rosslyn, Lord R. said that in *The Attorney-General v. Buller*, he was rather overborne by the observation of *The Attorney-General*, and that his own opinion rather concurred with Lord Eldon's, *ib.* But if there be anything in the will which denotes an intention of controuling the general words; then a trust estate will not pass; as where a

testator, under a general devise of his estate, subjects it to the payment of his debts, *Roe d. Reade v. Reade*, 8 T. R. 120. *Duke of Leeds v. Munday*, 3 Ves. 349. 5 Ves. 341, note. Ex parte *Morgan*, 10 Ves. 101., and the situation of the devisee may be called in aid of expressions in the will to shew the intention of the testator, per Lord Eldon in *Lord Braybrooke v. Inskip*, 8 Ves. 435; as where a testator bequeathed, "all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, and of what nature or kind soever, to his natural son George Hall, now a midshipman belonging to his ship the *Canton*, his heirs, executors, administrators, and assigns for ever, to and for his and their own proper use and behoof." It was held by Lord Eldon, that an estate in the testator, as mortgagee in fee, did not pass, Ex parte *Brettell*, 6 Ves. 578.; and in that case it was understood that Lord Eldon relied upon the expression that it was given "to the use and behoof" of the party; but when that case was afterwards mentioned in *Lord Braybrooke v. Inskip*, Lord Eldon said, "that he did not mean to put any thing upon the expression, that it was given to the use and behoof of the party, and that it came on upon petition, and perhaps was not so attentively considered, as the importance of the point required; but it was not his intention to say, that in the naked instance of a dry trust estate with nothing more in the will than a mere devise in general terms, that he understood the general rule to be, that it would not pass."

equity of redemption or foreclosure is considered in equity as a new purchase or acquisition of the real estate in the land.

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On the like reason in the case of *Burnett v. Kinnaston*, 2 Vern. 401, a mortgage in fee of the wife, was held to be only a chose in action.

Now if this be the nature of the mortgagee's interest, in the eye of this court, it will follow necessarily from hence that the nature of the interest of the person who has the equity of redemption, must, in the eye of this court, be a real estate; for otherwise, the ownership of the land, the real property in equity, will be sunk and vested nowhere, which is not to be admitted; and therefore, if it be not in the mortgagee it must remain in the mortgagor.

This will be further proved by considering the common case of a mortgage in fee made after a devise of the land. It is in law a total revocation of the devise; but in the consideration of equity it is only a revocation *pro tanto*, it amounts to the same as letting in a charge upon it. (2)

The true ground of this is, that the ownership of the land doth in equity remain in the mortgagor; and therefore, it shall pass by his devise, though made precedent to the mortgage.

It has been objected, on the part of the plaintiff, that an equity of redemption, is only a right of action in equity to be recovered on certain terms; but what I have already said proves this not to be well founded. It is no otherwise a right of action in equity than any interest is, which a man cannot come at but by suing a *subpœna*, as the law books term it; and that is the case of every mere trust of land which is admitted to be considered always as a real estate in this court. To say that this is a mere right of action in equity will be to fall under the difficulty which I just now

(2) *York v. Stone*, 1 Salk. 158. *Perkins v. Walker*, 1 Vern. 97. *Hall v. Dunch*, 1 Vern. 329, 342. *Duke of Bridgewater v. Bolton*, 2 Ld. Raym. 968. *Rider v. Wager*, 2 P. Wms. 334. *Parsons v. Freeman*, 3 Atk. 748. *Baxter v. Dyer*, 5 Ves. 656. *Harmood v. Oglander*, 6 Ves. 199., affirmed in 8 Ves. 106. *Charman v. Charman*, 14 Ves. 580. *Innes v. Jackson*, 16 Ves. 356. *Fawcett v. Jeffrey*, ib. 316. So a conveyance for the payment

of debts is only a revocation *pro tanto*, *Vernon v. Jones*, 2 Vern. 241. *Ogle v. Cook*, cited 2 Bro. C. C. 592. *Brydges v. Duchess of Chandos*, 2 Ves. jun. 428. But if there be uses beyond the mere particular purpose of a charge or incumbrance, then the devise will operate as a revocation both in law and equity, per Lord Eldon in *Harmood v. Oglander*, 8 Ves. 202. *Cave v. Holford*, 3 Ves. 650. *Rawlins v. Burgess*, 2 Ves. & Bea. 382.

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took notice of, that then the estate in the land will be in nobody, for it has been determined in this Court that the mortgage is only in the nature of a chose in action; and the objection which I am now considering affirms the equity of redemption to be a chose in action also.

It has also been objected that a mortgagee is not a bare trustee for the mortgagor. It is true that a mortgagee is not barely a trustee; but it is sufficient for this purpose that he is in part a trustee. He is owner of the charge or incumbrance upon the mortgaged premises, and is *entitled in his own right to hold the same as a pledge for his debt*; but as to the *inheritance* descendible, the real estate in the land, he is a trustee (3) for the mortgagor till the equity of redemption is foreclosed either by decree or by such a length of time as courts of equity allow to bar a redemption.

The next consideration is, what is requisite to entitle the husband to be tenant by the curtesy of an equitable estate in land, where the wife had not the legal estate during the coverture. At common law four things are necessary to make a tenancy by the curtesy:—Marriage;—the having issue which by possibility may inherit the land;—death of the wife;—seisin of the wife in fact during the coverture. So it is laid down in Co. Litt. 30 a.

It is admitted that the three first of these requisites concur in the present case; but the objection relied upon is, that there was no actual seisin of the wife during the coverture, which as it has been contended is necessary as well in the case of an equitable estate as of a legal one.

That *no actual seisin* of the freehold was in the wife must be admitted; nay it must be admitted that she *had no seisin whatsoever of the legal estate, either in fact or in law*; but that is *beside the question*, for it proceeds upon a supposition that there can be no such thing as a tenancy by the curtesy of an equitable estate. This argument therefore, proves too much, and will contradict and overthrow many cases which have been determined and settled, for which reason it is not to be admitted.

The true question upon this point is, whether there was such a seisin or possession in the wife, of the equitable estate in the land as in the consideration of this court is equivalent to an actual seisin of the freehold at the com-

(3) See Hard. 467. 2 Vern. 104. Walk. Rep. 184., and the judgment in and *Cholmondeley v. Clinton*, 2 Jac. & that case in the House of Lords, ib. 190.

mon law. And upon the best consideration which I have been able to give this case, attended with the greatest deference for the decree already pronounced, I am of opinion that there was such a seisin.

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By the reasoning which I have already offered under the first head, I think I have shewn that an equity of redemption even upon a mortgage in fee unforeclosed, *is the ownership of the land or the real estate in equity*. Then there must be such a thing as a seisin of it in the notion of equity, and what other seisin could there be besides that which the defendant *Inglis* and his wife had in this case.

The mortgage was made but in the year 1728. In 1729, *Ann Casburne* married the defendant *Inglis*. In 1731 she died, leaving issue a son, inheritable; and as there was no foreclosure, so the wife all along continued in possession of the estate, and though *that possession was at law but as tenant at will to the mortgagee, yet in equity it was as owner of the estate, subject to the pecuniary charge or incumbrance*; so that here was an equity of redemption, clothed with an actual possession and receipt of the profits, which had never been interrupted. From hence it follows that there cannot be a higher instance of an actual seisin of an equitable estate. The question then will be reduced to this, whether there can be a tenancy by the curtesy of an equitable estate of the wife? But that has been so often determined, that I take it to be the settled law of this Court; it is founded on the maxim, that equity follows the law, which is a safe as well as a fixed principle, because it makes a *substantial rule of property, certain and uniform, let the form or mode of that property be what it will*. In the case of *Lady Williams* and *Sir Bouchier Wray*, 2 Vern. 680., it was taken as settled, and two cases are there cited, wherein it was determined that the husband should be tenant by the curtesy of a trust-estate; *Balls'* case, and the case of *Worthington v. Fletcher*. This is so clear and known, that it was admitted by the counsel for the plaintiff, and yet the case of a trust estate subject to debts, differs very little from a mortgage in fee; nay, if the trustees are in possession, it seems to me much stronger against the claim of the husband than the present case. The case of *Sweetapple v. Bindon*, 2 Vern. 536, went a great deal further.

A husband shall be tenant by the curtesy of the equitable estate of his wife. (1)

(1) So *Watts v. Ball*, 1 P. Wms. 108. *Chaplin v. Chaplin*, 3 P. Wms. 234. Harg. Batl. Co. Litt. 29 a. note 6.

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In that case *Mrs. Bindon* gave a sum of money to be laid out by her executors in the purchase of lands to be settled on *Mary* her daughter in tail, with remainder over. The mother died, and *Mary*, the daughter, married the plaintiff *Sweetapple*, and had issue by him. The issue died, and *Mary* the wife died. The surviving husband brought this bill to have the money laid out in land and settled on him for life as tenant by the curtesy.

On the hearing of the cause, my Lord *Cowper* adjudged, that the husband was entitled to be tenant by the curtesy, and decreed the money to be laid out in land, and the land when purchased to be settled on the husband for life accordingly.

In the present case, the principal objections relied upon were two.

First, That here was a laches in the husband, for that he might have paid off the mortgage-money, or brought his bill to redeem, and thereby have gained the legal estate, and that it was his neglect not to do it.

Secondly, That it has been determined, that a wife shall not be endowed of an equity of redemption, and the rule ought to be equal between husband and wife. As to the first, it was compared to the laches which the law imputes to a husband in not making an entry, One answer to this objection is, that the comparison will not hold, for it is by no means to be presumed to be so easy to pay off the mortgage-money, as to make an entry.

The mortgagee is, by the rules of this Court, entitled to six months' notice before he is obliged to take the mortgage-money.

If a bill is to be brought, a much greater delay and more difficulties will occur.

But the clear answer to this objection is, that it equally holds in the case of a trust estate or of a sum of money to be laid out in the purchase of lands. If it had been a mere trust estate, the husband might, with more ease have obtained a decree for a conveyance, than in the case of a mortgage for a redemption; and in the case of *Sweetapple v. Bindon*, the husband might undoubtedly have brought his bill to have the money laid out in a purchase of land. But this was not allowed to be a sufficient objection in either of those cases.

This objection, however, was endeavoured to be strengthened in the case now in judgment, by alleging, that the hus-

band might be encouraged to suffer the interest to run on upon the mortgage without redeeming, so as to load the estate.

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I own I do not quite take the force of that reasoning. If it means the interest accruing due during the life of the wife, I apprehend that it is not to be regarded; for the husband and wife being owners of the estate, may do what they will with their own. The heir of the wife is in herself, and has no right to object that his ancestor has left too great a burthen of interest upon him. If it means the interest to incur after the wife's death, and during the subsistence of the tenancy by the curtesy, the heir will have the same remedy in this Court against the tenant by the curtesy as against any other tenant for life, to compel him to keep down the interest.

Secondly, As to the other objection, that it has been determined that a wife shall not be endowed of an equity of redemption of a mortgage in fee, and that the rule ought to be equal.

This proves abundantly too much, for it has been also determined that a wife shall not be endowed of a mere trust estate, of which it is admitted that the husband shall be tenant by the curtesy. This shews that the argument drawn from the case of dower to the case of tenancy by the curtesy of an equitable estate entirely fails upon the precedents of this Court. How it came to be so settled at first is of a different consideration, and perhaps it may be hard to find out a sound reason for it; but it is safest to follow and adhere to that which has been settled and established.

When any dissatisfaction has been expressed concerning any of the determinations, it has generally been at the denying of dower to the wife, not at the allowing an estate by the curtesy to the husband; and if any alteration was to be introduced, the nearest way, in my humble apprehension, to attain the mere right, would be to allow the wife to have dower of a trust estate, not to disallow the tenancy by the curtesy of the husband. But as things now stand, I take the ground of those cases wherein the wife has been refused the aid of this Court to have dower of an equity of redemption of a mortgage in fee to have been, that she could not have it of a trust estate, which was still building on the same principles; and if that were so, the consequence in the case of tenant by the curtesy holds just the contrary way, for the husband is

ANONYMOUS. verdict. Lord *Hardwicke* said the defendant must pay the costs at law ; but as the laches arose on the part of the plaintiff, and the obscurity of the title to the rent, from the want of a demand for such a length of time, he shall not be allowed costs against the defendant in equity.

plaintiff, that a former owner of *Elbridge* farm, who had sold it about thirty years since, had paid to the plaintiff's father a rent of 11s. 11d. And a rental of 1701, of yearly quit rents, due to Sir C. Bishop for his manor of *Drayton*, was produced, wherein the rent of 11s. 11d. payable in respect of *Elbridge* farm, was mentioned.

His Lordship directed an issue to try whether the plaintiff was entitled to a rent of 11s. 11d. issuing out of the said lands called *Elbridge* farm, or any part thereof, and if it appeared out of which part of the farm the said rent issued, the jury were to indorse the same on the *postea*. Reg. Lib. A. 1736. On the 28th January, 1737, the cause came on again to be heard upon further di-

rections, when it appeared that the plaintiff obtained a verdict, that he was entitled to the rent of 11s. 11d. issuing out of *Giddycroft* part of the said *Elbridge* farm. Whereupon his Lordship ordered and decreed that the same be established, and that the defendants do pay unto the plaintiffs the arrears of the said rent, to be computed from the time of filing the said plaintiff's bill to Michaelmas last; and that the defendants do continue the growing payments thereof yearly to the plaintiff and his heirs; and that the defendants do pay unto the plaintiff his costs at law, to be taxed by one of the masters of this Court. But as to the costs in equity, his Lordship doth not think fit to award any to be paid on either side, (2) (3)

(2) See *Clifton v. Orchard*, next Case.

(3) Reg. Lib. A. 1737. fo. 212.

CLIFTON v. ORCHARD, Clerk. (1)

Jan. 28th, 1737.

1 Atk. 610. **THERE** having been two verdicts in this case in favour of the plaintiff in equity, the *modus* was now established with the costs at law, but none were given with regard to the proceedings in equity; for the Lord Chancellor said, the suit in this Court was merely for the security of the plaintiff, and to prevent any further impeachment of his right to an exemption from the payment of tithes in specie; and that this was like the case of a bill brought to perpetuate testimony of

Issues directed by this Court, to try a *modus*, though established in favour of the plaintiff by two verdicts, the plaintiff entitled to his costs at law only, and not in equity. (2)

(1) This case is taken from *Atkyns*. It corresponds with the same case in Lord *Hardwicke's* Note-book.

(2) So *Sanders v. White and Balliol College*, cited in *Anderdon v. Davies*, 4 Gwill. 1268.

witnesses, wherein costs are never given against the defendant: that the plaintiff might have applied for a prohibition, and if he had succeeded therein at law, he would have had his costs, and he ought to have the same advantage with regard to the proceedings at law directed by this Court, but that there was no pretence for any other costs.

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His Lordship decreed, that the modus found by the said verdicts be established; and upon the plaintiff's paying the arrears thereof, and continuing the growing payments thereof to the defendant, the defendant be enjoined from proceeding against the plaintiff for the tythes in kind of those things for which the said moduses are payable, and ordered the defendant to pay costs to the plaintiff, in respect to the proceedings at law, to be taxed; but as to the costs in equity, relating to the moduses, his Lordship did not think fit to award any to be paid by either of the said parties.(3)

(8) Reg. Lib. A. 1737. fo. 207.

ELIZABETH GIBSON Plaintiff; (1)
and
THOMAS PATTINSON, JOHN LIDDLE, }
Executors of JAMES LIDDLE, and JO- } Defendants.
SEPH LIDDLE }

Jan. 31st, 1737.

A BILL brought for a specific performance of articles of agreement for sale of an estate, and decreed in favour of the plaintiff. 1 Atk. 12.
Though a vendor of an estate does not produce his deeds, or tender a conveyance within the time limited by the articles, the Court does not regard this neglect, but will decree a sale notwithstanding.

(1) This case is taken from *Atkyns*. Mr. *Atkyns* makes Lord *Hardwicke* say, "that time is not at all material;" and it is observed by Lord *Rosslyn*, that the circumstances of the case did not call for any such opinion, see *Harrington v. Wheeler*, 4 Ves. 690. It appears in the Register's Book, that by the articles of agreement stated in the bill, and which are admitted by *Pattinson's* answer,

that by articles of agreement of the 30th of November, 1734, the plaintiff, in consideration of 260*l.* to be paid as thereafter mentioned, covenanted with *Pattinson* that she would, on or before the 2d February then next, at the costs of the defendant *Pattinson*, and by such conveyances as his counsel should advise, convey to him and his heirs the premises in question, and that *Pattinson* was to pay to the plaintiff 155*l.*, part

GIBSON plaintiff, the vendor, without any regard had to the plaintiff's
v. negligence in not producing his title-deeds, &c. and not ten-
PATTINSON. dering a conveyance within the time limited for that purpose
by the articles.(2) The *Lord Chancellor* saying, most of the

of the consideration, on executing such conveyances, and 45*l.* on or before the 31st August then next, and 60*l.*, the residue, on or before the 2d February, 1735; and the bill alleged that *Pattinson* had let part of the premises to the plaintiff, at a rent of 4*l.* 10*s.*

The defendant *Pattinson*, by his answer stated, that he had requested the plaintiff to produce her title deeds, and that she would either leave them or copies thereof with him, that he might advise with his counsel upon her title, and have proper conveyances drawn for her to execute; but she then only thought fit to produce an old deed, in which there was no description of the boundaries or quantities, and refused to leave the same with him, or produce any deeds or other writings. That he the defendant, in case the plaintiff had produced the deeds, and made him a good title, was willing, and had prepared the purchase-money; but the plaintiff not producing the deeds before the 2d February, 1734, he apprehended the plaintiff was unwilling to perform the articles, and that he was not any longer bound thereby, and had disposed of the purchase-money elsewhere; and he hoped he should not be compelled to perform the articles. It appeared that the premises were in mortgage; and those interested in the mortgaged premises stated, by their answer, that they had always been, and then were ready to join in the conveyance.

It appears by Lord *Hardwicke's* Note-book, that evidence at the hearing of the cause was produced on the part of the plaintiff, by which it was proved that instructions had been given by *Pattinson* for a conveyance to be prepared, but which he afterwards countermanded, and then said he would not stand to his bargain. There was evidence, likewise, that *Pattinson* had demised part of the premises in question to plaintiff for a year, at 4*l.* *per annum*; and it was proved that on the 11th of

March, 1734, the plaintiff acquainted *Pattinson* that she was ready to convey the premises, whereupon *Pattinson* told the plaintiff that he would not stand to his bargain, for he had no money, and if she pressed him he would fly into *Scotland*.

(2) It is said by Lord *Alvanley* that a party cannot call upon a court of equity for a specific performance, unless he has shewn himself ready, desirous, prompt, and eager, *Milward v. Thanet*, cited in *Lord Hertford v. Boore*, 5 Ves. 720. And where a purchaser frequently applied to the vendor for an abstract, and none was delivered previous to the time agreed upon for the completion of the purchase, and the purchaser then insisted upon his deposit, the Court refused to give relief, *Lloyd v. Collett*, 4 Bro. Ch. Ca. 470. So where there was a delay of seven years, the parties differing upon the construction of the agreement, *Milward v. Earl of Thanet*, in note to 5 Ves. 720; and see *Harlington v. Wheeler*, 4 Ves. 686. *Spurrer v. Hancock*, 4 Ves. 667. *Lord Hertford v. Boore*, 5 Ves. 719. *Alley v. Deschamps*, 13 Ves. 228. And time is more essential in the sale of rever- sionary estates, *Newman and Rogers*, 4 Bro. C. C. 391. Or where they are sold for the purpose of disencumbering, *Popham v. Eyre*, *Lofft*, 786. *Crofton v. Ormsby*, 2 Sch. & Lef. 603.

It was formerly said by Lord *Thur- low*, that by the terms of an agreement, time could not be made of the essence of the contract, *Gregson v. Riddle*, cited in 7 Ves. 268. But it may now be considered as the settled doctrine of the Court, that by the terms of the agreement, time may be made of the essence of the agreement. *Per Sir John Leach*, *Reynolds v. Nelson*, 6 Mad. Rep. 26; and see *Seton v. Slade*, 7 Ves. 270. *Morgan v. Shaw*, 2 Mer. Rep. 140. *Levy v. Lindo*, 3 Mer. Rep. 84. *Hudson v. Burtram*, 3 Mad. Rep. 446. *Boehm v. Wood*, 1 Jac. &

cases which were brought in this Court relating to the execution of articles for sale of an estate were of the same kind, and liable to this objection, but thought there was nothing in the objection.

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His Lordship decreed the articles to be performed, and referred it to the Master to see if a good title could be made by the plaintiff of the premises in question, and in case a good title could be made, then upon payment of the purchase-money, part thereof in reduction of the mortgage, and the residue to the plaintiff, the plaintiff and the defendants, the *Liddells*, were to convey to the defendant *Pattinson*, who was to pay plaintiff's costs, to be taxed. Reg. Lib. A. 1737. fo. 322.

W. 419. But where a time is fixed for the completion of an agreement, yet a purchaser by his conduct may waive it; as where a purchaser being aware of the difficulties of the title does not call for his deposit at the end of the time limited for the completion of the purchase, and does not declare his dissent from going on with the purchase, *Pincke*

v. *Curteis*, 4 Bro. C. C. 329. Or where a purchaser accepts an abstract without objecting a few days previous to the time limited for the completion of the purchase, and keeps it without objection until the time has expired, *Seton v. Slade*, 265. *Levy v. Lindo*, 3 Mer. 81.

RICHARD RICHARDSON, Executor of
GRACE RAMSDEN, who was Heir and
Executrix of SUSANNAH RAMSDEN } Plaintiff; (1)
and
WILLIAM JACKSON, & JOHN NORTH } Defendants.
and SARAH his Wife }

Feb. 1st, 1737.

On the 22d of April, 1733, *Susannah Ramsden* executed a bond to defendant *William Jackson* of that date in the brought against him on a bond, pleads *non est factum*, and there is a verdict against him. This Court, upon a bill brought by the executor to injoin the action on the bond, and to be relieved, will only relieve against the penalty in the bond, upon payment by the executor of principal and interest due in respect of the bond, and the costs incurred both in law and equity, without regard to whether the executor had assets or not to pay the principal and interest on the bonds. (2)

(1) The statement of this case, which is reported by Mr. *Atkyns* under the name of *Ramsden and Jackson*, is taken from Lord *Hardwicke's* Note-book, the arguments of counsel and the judg-

ment from Mr. *Atkyns's* Report. Lord *Hardwicke's* note respecting this case is likewise added.

(2) See *Erving v. Peters*, 3 T. R. 685.

Richardson penalty of 700*l.*, with a condition that her heirs, executors,

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or administrators, should pay him 350*l.*, with interest, from the date of the bond. On the 31st March, 1734, Grace *Ramsden* executed a bond to the defendant *Sarah North*, of that date, in the penalty of 1,400*l.*, conditioned for the payment to defendant, *Sarah North*, within one month after her decease, of 300*l.*, with interest, at 5 per cent., and also 10*l.* a-year for her life, and also 100*l.* to the defendant *Jackson*, and 60*l.* to *Joshua*, *Rachel*, and *William Jackson*, children of the defendant *Jackson*, and 40*l.* to be equally divided among the other children of the defendant *William Jackson*, with interest from the date thereof. The plaintiff brought his bill, alleging that *North* and his wife had brought an action on their bond against the plaintiff, who had pleaded *non est factum*, and the cause was tried, and a verdict found for the defendants *John North* and his wife, and that though the defendants were well satisfied that the plaintiff had not assets to pay their demands, yet they threatened to sign judgment. The bill further alleged, that the defendant *Jackson* had brought an action against the plaintiff upon his bond, and threatened to proceed therein. The plaintiff by his bill alleged, that the bonds were obtained by fraud, and upon false suggestions, and prayed that they might be delivered up to be cancelled, and for an injunction to restrain the defendants from proceeding on the said bonds, and to be relieved in the premises.

LORD CHANCELLOR.—I am of opinion against the plaintiff on the merits that the bonds are good; and, therefore, the only question will be, on what terms the plaintiff should be relieved against the recovery at law, and some relief he is clearly entitled to, the judgment being for the whole penalty of the bond.

For the plaintiff it was insisted, that he had a right to be relieved, not only against the penalty, but likewise against the principal sum in the condition of the bond, or part of it at least, it being suggested that there is a deficiency of persons assets, and the plaintiff chargeable no further than he has assets.

The fact as to this was, that the plaintiff here pleaded *non est factum* to the bond at law, and had a verdict against him, and judgment in the usual form, *de bonis testatoris sed non de bonis propriis*. And it was admitted the plaintiff in this respect stands exactly in the same light as he would at law; and the question is, whether, when an executor

pleads *non est factum*, *non assumpsit*, &c. and verdict against him, that will not amount to an admission of assets, or if after such verdict, he may still defend himself by denying assets, and that matter be controverted on the sheriff's return to a *scire fieri* inquiry or otherwise.

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Mr. *Fazakerley* for the defendant, insisted that the verdict was an admission of assets, and that this case was the same with a judgment confessed by an executor, or had against him by default, and upon his memory referred to a case in *Salkeld's Reports*, where it had been so ruled: He admitted the executor was not chargeable *de bonis propriis*, in respect of his false plea, which he said, and it was agreed by the *Lord Chancellor*, held only in the case of *ne unques executor* pleaded. But that the executor in this case having thought fit to put his defence on the denial of the execution of the bond, and not having pleaded *plene administravit*, or by plea admitted assets to such sum, and *riens ultra*, &c. or made use of any defence of that kind, he cannot now resort to any such matter, or have the benefit thereof by any subsequent proceeding; that executors were in this respect only upon the same foot with all other persons; nothing is better established than this rule, that no advantage can ever afterwards be taken of what might have been insisted on by way of defence, and pleaded to the action. Nothing pleadable *puis darrein continuance*, which was *in esse* at the time of the plea pleaded. He observed likewise, that the disability a defendant at law was under, of making a double defence, gave occasion to that provision in the statute for the amendment of the law, the 4th of Anne, c. 16. s. 4. with regard to pleading several matters; there was no occasion otherwise for any such law in the case of executors, nor any reason for pursuing it now in those cases, though it is every day's practice. For if an executor, after a verdict against him on such a plea as this, or any of the like kind, may afterwards say he has no assets, that method of proceeding will be equally beneficial to him, and there would be no occasion ever to apply to the Court for leave to plead *plene administravit*, and any other plea. That the executor here might have applied to the Court for leave to plead double, but not having done so, the case stands upon the same foot it would have done before the act.

Lord Chancellor.—I agree with Mr. *Fazakerley*: The statute for the amendment of the law is quite out of the question. The name of the case hinted at by Mr. *Fazakerley*

RICHARDSON *is* *Rock v. Leighton*, 1 Salk. 310., but on looking into that case, I find the resolution there goes only to a judgment had against executors, either by confession or default, but no further; that the rule is in general as has been laid down, that advantage cannot be taken afterwards of what might have been pleaded to the action; as for instance in the case of a *scire facias* on a judgment, nothing can be pleaded thereto, which might have been pleaded to the action; but though I am inclined to think the verdict was an admission of assets, yet I will not give an absolute opinion, because the cause must be postponed at present, in order that the will may be produced, and the state of the assets laid before the Court, and the disposition of the testatrix of her real and personal estate; the fact, whether there were assets or not, being disputed by the parties. (1)

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A voluntary bond in equity shall be postponed to debts on simple contract, and if claimed for money lent, and the person fails in proving his consideration, it cannot be set up afterwards as a voluntary bond.

If an executor pleads *non est factum* to a bond, and not *plene administravit* likewise, he cannot, after verdict, take advantage of what might have been pleaded to the action. The

plea of *non est factum* only is an admission of assets, and held the same as in case of a judgment by default against an executor.

Can be relieved only against the penalty of the bond, by paying principal and interest, without regard to his having assets or not.

N. B.—The bond against which the relief is prayed being a voluntary one, it was admitted clearly it must be postponed in equity to debts by simple contract; (2) and also, that where a bond is claimed in consideration of money lent, and the person fails in proving his consideration, he shall not be allowed afterwards to set it up as a voluntary bond. (3)

This point coming on again, whether the plea of *non est factum* admitted assets, the Lord Chancellor held it did, and said he had seen Lord Chief Justice *Holt's* report of the case *Rock v. Leighton*, where the very case now in question was put by *Holt*, Chief Justice, who said the law was the same as in the case of a judgment by default against an executor, though that is not mentioned in the report of the case by *Salkeld*.

Decree, that the plaintiff should be relieved against the penalty of the bond, on payment of principal and interest, &c. without any regard had at all to the question, whether the executor had assets or not to pay such principal and interest. (4)

(1) Cro. Jac. 294. *Legate v. Pinchion*.

(2) But will be preferred to legacies, *Cray v. Roche*, Ca. Temp. Talb. 155., and see *Fairbeard v. Bowers*, 2 Vern. 202. S. C. 1 Eq. Ab. 143. pl. 15.

S. C. *ibid.* 152. pl. 4. S. C. *Blount v. Doughty*, 3 Atk. 483.

(3) Prec. in Chan. 17.

(4) The following Note respecting this Case appears in Lord *Hardwicke's* Note-book:—

RICHARDSON v. NORTH.

February 1st, 1737.

I gave my opinion, that there was no ground to relieve the plaintiff on the merits, but only against the penalties of the bonds, on payment of principal and interest, and costs; but reserved to consider whether the judgment on a verdict on a *non est factum* at law, which is *de bonis testatoris*, was an admission of

assets for the whole debts, according to the case of judgment by confession or default, *Rock v. Leighton*, 1 Salk. 310. or whether on a *sci. fa.* or *inquir.* the executors might controvert assets at law; and consequently, whether an account of assets ought to be directed here.

PLUS DE RICHARDSON and NORTH.

February 2nd, 1737.

Ex. MS. Holt, C. J. *de son Resolution in Rock v. Leighton.*

2dly, The case of an executor doth not in this case differ from that of an heir; for if the heir lets judgment go by *nihil dicit*, or confession, he admits assets. It is true, the judgment is different, for the heir is chargeable on account of assets that he hath in his own right, but the executor is chargeable in respect of assets that he hath in right of the testator; but still the admission of assets is as much by a *nihil dicit*, or confession, in one case as in another.

The like, if an heir pleads *non est factum*, or conditions performed, a general judgment shall be entered, if the matter pleaded be found against him. So in the case of an executor, if the matter pleaded be found against him, he admits assets; for if he hath none, why doth he plead that matter, it would be enough to deny assets.

Decree relief on the usual terms of payment of principal, interest, and costs.

By the decree in the Register's book,

his Lordship ordered, that so much of the plaintiff's bill as seeks to be relieved against the bonds in question, and against the judgment obtained on the bond given to the defendant *Sarah*, on account of imposition, or the want of consideration, be dismissed; and an account of what was due in respect of the bond given by *Grace Ramsden* to *Sarah*, the wife of *John North*, was directed, and also the arrears of an annuity secured thereby, and also a taxation of their costs in law and equity, and upon the plaintiff's payment of what was due on such accounts, and the costs, and the arrears of the annuity and the growing payments, that the injunction was to be continued, but in default, the bill was to be dismissed, and injunction dissolved.—The same order was made in respect of the bond given by *Susanna Ramsden* to the defendant, *Wm. Jackson*, except that his bond was to be delivered up to be cancelled upon payment of principal, interest, and costs, no annuity being secured thereby. Reg. Lib. B. 1737. fol. 228.

SAMUEL MORRIS and ELIZABETH }
 his Wife } Plaintiffs; (1)

and

GILES BURROWS, Executor of JOHN }
 BURROWS, SAMUEL WOLLAS- }
 TON and MARY his Wife, JOHN } Defendants.
 BURROWS, EDWARD ROSS and }
 ANN his Wife, and Others }

February 3rd, 1737.

1 Atk. 399. JOHN BURROWS, a tradesman at *Thame*, in *Oxfordshire*, having five children by his first wife, who was dead, and intending to remove to, and to become a freeman of *London*, but being desirous of reserving to himself a power of disposing of his personal estate, three of his children (the others being under age) entered into the following agreement with him, which bore date the 11th September, 1718, and was executed by these three children, and their father.

A father having five children, three of age, and two infants, enters into an agreement with three of them, who were of age, that he should have full power and authority to dispose of his personal estate in such manner as if he was not a freeman of the city of *London*, and they release all right under the custom, and agree not to sue for any part of his personal estate which he may dispose of by will, and to execute releases to his executors. The father soon after the agreement becomes a freeman, and marries a second wife, upon whom he settles part of his personal estate, in bar of what she might claim under the custom; (2) held that this agreement could not operate as a release, the children having neither *jus in re* or *jus ad rem*, nor as an agreement, there being no consideration moving from the parent to the children, and the agreement, as far as regarded the father being nugatory, by two children not being parties to it, whereby the father did not retain an absolute power over his personal estate; and held that the husband did not become a purchaser of his wife's share of the personal estate; but that the same accrued to the whole estate.

And the father upon the marriage of one of his daughters having purchased an estate, which he settled (reserving to himself an annuity) upon herself and her issue, the husband by his receipt acknowledging the purchase-money to be advanced in part of his wife's fortune; held that it could not be considered as a settlement of real estate, but must be considered as money advanced by the father, and that the purchase-money without regard to the annuity, must be brought into *hotch-pot*.

Whereas *John Burrows*, of *Thame*, is of opinion that he may greatly improve his estate by following some trade of buying and selling in the city of *London*, and for better performing the same, apprehends it necessary to purchase a

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from two other manuscript reports, which correspond with some short heads of it in his Lordship's handwriting.

(2) By 11 G. 1. c. 11. s. 1. it shall be lawful for such persons who after the 1st of June, 1725, shall become free of the city, being unmarried, and not having issue, to dispose of their personal estate.

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freedom of the said city; and whereas, in case he becomes a freeman, he shall thereby disable himself from absolutely giving or disposing of his personal estate, by will or otherwise, amongst his children, as he can now do; and whereas, we whose names are hereunto subscribed, are desirous he should become a freeman of the said city, in order to improve his estate, and are contented, and agreed that our said father should retain to himself full power and authority to give and dispose of his personal estate, in such manner as if he was not a freeman of the said city. Now we, *Giles Burrows*, *John Burrows*, and *Elizabeth Burrows*, children of the said *John Burrows*, do hereby for ourselves, our executors, administrators, and assigns, severally and respectively discharge, release, and disclaim, any right, title, interest, claim, and demand whatsoever, of in and to all and every part of the personal estate, which our said father shall die possessed of, other than such parts as he shall by his last will or otherwise, legally give unto us, or in case he shall die intestate we shall then be entitled unto by the laws of the land, and the custom of *London*; And we do severally covenant, promise, and agree, that in case our said father shall make, and leave a will behind him, at the time of his death, we will not sue for or claim any part of his estate, other than such as shall be respectively given to us, by such last will, and will at the request of the executor of such will, duly execute good and sufficient releases of all claims and demands to any part or share of the personal estate of the said *John Burrows*, whereof he shall be possessed at the time of his death.

Soon after this agreement, *John Burrows* came to *London*, became a freeman, and married a second wife, upon whom he settled part of his personal estate, in bar of what she might claim by the custom. He from time to time advanced several sums of money to his children. To *Giles* 1,800*l.*; to *John* 1,500*l.*; besides 100*l.* given to his wife, and some presents to his children.

Upon the marriage of his daughter, the defendant, *Mary Wollaston*, he laid out the sum of 630*l.* in the purchase of an estate, which was settled in trustees to the intent that *John Burrows* might receive thereout an annuity of 31*l.* 10*s.* during his life, then to the use of *Samuel Wollaston* for life, remainder to *Mary* for her life, remainder to such of her children as she should appoint, and for want of such appointment, to her children and their heirs; he also gave her

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and her children some small sums ; upon which *Samuel Wollaston* gave a receipt, acknowledging that he had received 778*l.* 15*s.* advanced in part of his wife's fortune.

The plaintiff, *Elizabeth*, received only 900*l.* upon her marriage.

John Burrows, the father, by his will, dated in October, 1732, reciting the agreement, and that he had power to dispose of his personal estate, gives several unequal legacies to his children and grandchildren, and the residue to be equally divided amongst his children, and declares that in case any of his children, their husbands or representatives, should not abide by his will, but should endeavour to have his estate divided according to the custom of *London*, and should not execute to his executors within six months after his decease, releases of all claims to any part of his personal estate under the custom of *London*, that then the legacies thereby given for the benefit of such children, and to their husbands, child or children, should be void, and sink into the *residuum* of his personal estate.

The bill prayed that the agreement might be set aside, that the plaintiff might be paid the customary share of the testator's personal estate, and that the other children might bring their advancements into *hotch-pot*, or if the Court should think the agreement valid, then that the plaintiffs might be paid their legacies under the will.

On behalf of the defendants, it was insisted that if the agreement was not valid, yet only one-third of the personal estate was subject to the custom, the husband having a right to dispose of that which would have belonged to the widow if she had not been barred. *John Burrows* insisted that the money given to his wife and children, and *Samuel* and *Mury Wollaston* insisted, that the estate settled upon them, ought not to be considered as advancements.

Mr. *Browne*, Mr. *Clarke*, and Mr. *Talbot*, for the plaintiffs.

This instrument cannot operate as a release, there was no vested interest in the children upon which it could operate, the father was not even a freeman at the time ; there have indeed been cases founded on marriage contracts, in which such releases have had effect, *Metcalf v. Ives* ; (2) but that was after the freedom had been taken up, and in consideration of a portion given ; the child therefore gained a cer-

(2) See *Metcalf v. Ives*, ante, p. 82.

tainty for an uncertainty. As an agreement, it cannot be supported; it was obtained by the force of parental authority, and without consideration; the advantage was entirely on the father's side. As between the children, the agreement was wholly unequal; those who signed it were to be deprived of their share, and those who did not, might have engrossed the whole. The Court has been very cautious and strict against frauds on the custom, *Kemp v. Kelsey*, Pre. Ch. 545, 594. *Blunden v. Barker*, 1 P. Wms. 634. *Fairebeard v. Bowers*, 2 Vern. 202. If an action was brought on the covenant, what was recovered would be assets. As to the composition with the wife, that will not accrue to the dead man's part, but to the whole estate. In *Townsend v. Townsend*, it was held by Lord King, that a wife compounded with, was to be considered as dead. As to the 630*l.* laid out in land, it was paid out of the personal estate of the father, and must therefore be brought into *hotch-pot*; there is no pretence for contending that any forfeiture is incurred by raising these questions, *Powell v. Morgan*, 2 Vern. 90.

Mr. Attorney-General, and Mr. Duval, for all the defendants, except *John Burrows*.

We do not contend that this instrument operates as a release, but insist that it is binding as an agreement; we are not asking the assistance of a court of equity to carry this agreement into effect, but wish only to be left to our legal remedy for the breach of covenant.

The Court will not relieve against an agreement, unless they can put the parties into the same condition they were in before it was entered into. That is impossible in the present case, the Court cannot restore to the father the power of disposing of his personal estate, which power he gave up in consequence of this agreement, by taking up his freedom, and thereby performed his part of the contract. As to the consideration, it was for the benefit of the children that the father should improve his estate by becoming a freeman, and the children gave up nothing, because the father, at the time of making the agreement, had the power of disposing of his whole estate. It is true, that some of the children are not bound; but those who signed the agreement were aware of that circumstance at the time. If the father had expected that this agreement would be disputed, he would have barred the plaintiff's claim at the time of the marriage. As to the question of *hotch-pot*, the real estate purchased with the 630*l.* settled as it is, cannot be considered as an advancement so

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as to be brought into *hotch-pot*. In *Whitcombe v. Whitcombe*, before the *Master of the Rolls*, May 3, 1718, it was held that small sums given by a father to a child, were not to be considered as an advancement, but such only as were given by way of portion.

Mr. Owen for the defendant *John Burrows*, joined with the plaintiffs as to the question of bringing the 630*l.* into *hotch-pot*.

Feb. 3, 1737.

LORD CHANCELLOR.—I do not recollect any instance of such an agreement as this, so that this point must be determined from the reason of the thing, and from the resolutions in cases bearing some analogy to it; but before I come to that, it is necessary to remove an objection which has been made, which is, that though this should be deemed a voluntary agreement, yet that the plaintiffs will not be entitled to be relieved against it, because there was no fraud in obtaining it, and that though the Court would not decree the performance of such an agreement, yet that it will not interpose to set it aside, but will leave the parties to law. Now this is certainly true, where a bill is brought merely to set aside an agreement, and that agreement is the only matter before the Court; but that is not the present case, because the plaintiff is entitled to a decree for her share of the testator's estate, either upon the foot of the custom, or upon that of the will, which necessarily brings in question the validity of the agreement. This Court must distribute the personal estate, and for that purpose must incidentally decide the present question. In this respect this case may be resembled to cases of redemptions and trusts, in which questions merely legal are determined in this Court, because here and no where else can the directions necessary for the redemptions, or for the execution of the trusts be given. The sons are executors and also residuary legatees, but they are not sole residuary legatees, consequently they are in the nature of trustees for the rest, and before any agreement can be decreed against them, the validity of the agreement itself must be considered.

As a release this agreement certainly cannot be good, since it hath been often determined, that a release of his customary share from a child to his father, then actually a freeman, is void; because the whole is in the father during his life, and the child hath neither *jus in re* nor *ad rem*, which is a much stronger case than the present; for there, though no right be actually vested, yet there is something of a right commenced; but here there is not so much as a right *inchoate*.

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Neither do I think that it can be supported as an agreement, there being nothing moving from the father as a consideration. It has been contended that the consideration consisted in the father's taking up his freedom; but that argument totally fails, for there is no covenant on his part to take up his freedom, it rested still with his discretion whether he would or would not become a freeman. The agreement only recites, that it might be advantageous to him to become one. Nor can this act of his, if certain of taking place, be considered as a benefit to the children, for supposing the agreement to be binding, the increase of his estate would still be in his power. He might spend it, or lay it out in land, so that the children might or might not be benefited by it, just as he pleased.

But I do not lay so much stress upon this, as I do upon the circumstance of the agreement itself being nugatory, and the end of it impossible ever to be obtained on either side. The object was to reserve to the father a power of disposing of his property in the same manner as if he had not become a freeman; but that was impossible, two of the children being infants, and not parties to, and not bound by the agreement. This affects the consideration, both with regard to the children and the father. The children who signed this agreement must have intended some benefit to themselves, by the increase of that property which their father might have the power of disposing of amongst them; but if this agreement were to be held to be binding, the consequence would be, not any increase of property for their advantage, but that those children who executed it would be deprived of their whole orphanage share, which their father would have no power to dispose, but which would go to those children who were not parties to it. So with regard to the father, his object was, that notwithstanding his becoming a freeman, he might retain the power of disposing of his personal estate; but this object for the same reason he wholly failed of attaining. As to any subsequent agreement by the two children, who were not parties to the first, that will signify nothing; for if the agreement was void at the time it was made, matter *ex post facto* cannot make it good. This agreement, therefore, has proceeded on a plain mistake on both sides; at least the end of it could never be attained. Besides which, agreements of this kind are discountenanced, they are derogatory from the custom which allows nothing to bar the child but an actual advancement from the father.

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A sum of money advanced by a father to a child upon marriage, or in trade, may amount to a bar of his customary share.

Wherever such agreements have been held good, there has been a just and valuable consideration moving from the parent to the child, as a sum of money upon preferment in marriage or in trade, which tends to the child's present advantage. It was so in *Blunden v. Barker*, 1 P. Wms. 635. before Lord *Macclesfield*, but which was never finally determined; and in *Metcalf v. Ives*,⁽¹⁾ lately determined. The only end of those agreements was, to exclude the child from claiming a further share of the father's estate, and not to give the father a power of disposing of the whole, which was the object here, but which could not be effected by this agreement. The effect of parental authority has always been considered as great. The Court, therefore, to remove the presumption of such influence, expects to find in these agreements a valuable consideration and benefit moving from the father to the child, and not only the means provided by which the father may improve his own estate for his own benefit; but at the same time I give no opinion how far such an agreement as the present would have been good, if all the children had been of full age, and had been parties to it.

As to the question of what is to become of the widow's share, it has been several times determined, that where a wife is compounded with, the husband is not to be considered as a purchaser of her third, but that her part accrues to the whole estate, and that the orphanage part becomes a moiety of the whole.⁽²⁾

As to the question, whether the advancement to the defendant *Wollaston* shall be brought into *hotch-pot*, I think that he has concluded himself by the note acknowledging the several sums advanced by the testator to be in part of his wife's fortune. The case of *Whitcombe v. Whitcombe*, at the Rolls, 3d May, 1718, is an express authority that only such sums as are given by way of portion, and not petty small sums, are to be considered as an advancement.⁽³⁾ But here the defendant has himself acknowledged the sums mentioned in his note to be in part of advancement, and therefore they must all be brought into *hotch-pot*. Nor do I think that the investing the money in land will make any difference. Had it been a real estate moving originally from the father, that might have been another consideration; but being given in

(1) See *Metcalf v. Ives*, ante, page 82.

(2) So in *Metcalf v. Ives*, and the cases cited in note 2.

(3) See *Hume v. Edwards*, 3 Atk. 452. 3 P. Wms. 317, note (O). *Elliot v. Collier*, 1 Ves. 16. 3 Atk. 527. *S. C. Smith v. Smith*, 5 Ves. 721.

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money originally, and to be settled in such manner as his daughter should think fit, I do not think that it will make any difference.

It has been objected that as there is an annuity reserved to the testator for his life out of the estate purchased, the whole purchase-money ought not to be brought into *hotch-pot*; but the *collatio bonorum* does not take place till the testator's death, at which time the annuity had ceased; and it was determined in the case of *Edwards v. Freeman*, 1 Eq. Abr. 249. pl. 10. (4) the fund is to be considered as it stands at the father's death. This objection therefore is not material, and the whole must be brought into *hotch-pot*.

His Lordship declared the agreement of the 11th of September, 1718, was voluntary, and under the circumstances of the present case ought not to be considered as binding; and that the plaintiffs are entitled to their customary share of the orphanage part of the testator's estate, which, in this case is a moiety of the clear personal estate; but that they electing to take by the custom are not to have any benefit by the testator's will, (5) and that 630*l.* paid by the testator for the farm at *Brill*, in *Buckinghamshire*, for the defendant *Mary Wollaston*, is to be considered as so much money paid towards her advancement; and therefore ordered an account to be taken of the personal estate of the testator come to the hands of the executors; and after such account shall be taken, the defendants, *Giles* and *John Burrows*, *Mary Wollaston* and *Ann Rose*, the children of the testator, are to be at liberty to make their election as between themselves, Whether they will take by the will of the father or by the custom of *London*. (6)

(4) 2 P. Wms. 435. S. C.

(6) Reg. Lib. B. 1737. fo. 506.

(5) So *Pugh v. Smith*, 2 Atk. 43.

MINSHULL v. MINSHULL. (1)

February 4th, 1737.

1 Atk. 411.

R. L. devises to *R. M.* eldest son of his nephew *R. M.* and the first heirs male of his body, and the heirs male of his body, and in default of such issue, to the second son of the said *R. M.*, and the heirs male of his body, and their issues, remainder over, &c. These words, "the second son of the said *R. M.*"

do not mean the second son of the devisee, but *John*, the second son of the testator's nephew, *R. M.*

RICHARD LESTER, the testator, uncle of *Randal Minshull*, who had *Randal*, his eldest son, *John*, his second son, and several other children, devises his house *in hæc verba; viz.*—

"I give and devise the house, &c. to *Randal Minshull*, eldest son of my nephew, *Randal Minshull*, and the first heirs male of his body lawfully begotten, and the heirs male of his body, and in default of such issue, I give, &c. to the second son of the said *Randal Minshull*, and the heirs male of his body and their issues; remainder over, &c." There is a provision made in the will, "that to whomsoever the estate shall come, he shall pay, on his entry upon the estate, to each of his brothers and sisters 20*l.* a-piece. and to *John*, and the several children of his nephew, naming them particularly, 20*l.* a-piece likewise?"

The devise in the present case was of a reversion, which did not take effect till many years after the testator's death.

Randal, the first devisee, dies without issue; *John* enters and dies, having devised the premises to the defendant his younger son, in prejudice of the plaintiff his eldest son.

The bill was brought for an account of the rents, &c. and at the hearing at the *Rolls* the question was, whether in the devising words, "To the second son of the said *Randal Minshull*," the second son of the nephew, or the second son of the nephew's eldest son was meant; for supposing the latter, the particular limitations in the will extending only to the issue of *Randal*, the devisee, who was dead, without issue, the reversion on his death taking effect in possession in *John*, as heir at law of the testator, the disposition of *John* by will was good; but supposing the will to mean the son of *Randal*, the nephew, that *John* being tenant in tail, under the will, and not having done

(1) The arguments of counsel in this case are taken from the *Lord Chancellor's Note-book*, the statement of the case and the judgment, from *Atkyns*.

any act to bar the entail, the plaintiff has a good title, as being the eldest son of *John*. MINSHULL
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The *Master of the Rolls* (1) decreed in favour of the plaintiff.

On appeal to the *Lord Chancellor*, he directed an issue to try the matter of fact, which of the two persons was meant by the testator, and said, it was a matter that lay properly in averment, and was determinable by circumstances, proving the intention of the testator, one way or other. The will was made in 1658, and the parties not being able on either side to furnish themselves with any evidence, tending to clear up this point; it was agreed between them to bring the matter on, for the opinion of the court, upon the legal construction of the words as they appeared on the face of the will.

Mr. *Attorney-General* and Mr. *Fuzakerley* for the plaintiff.

We insist that the second son of the testator's nephew is meant, and not the second son of such nephew's eldest son. To shew that this is the true construction, it is only necessary to consider what estate the first devisee, the eldest son of the nephew, took. We insist that he took an estate-tail, and if so, it is clear that the limitation over which is to take effect only upon failure of issue of such eldest son cannot be to the second son of such eldest son. It is reasonable to suppose that the testator intended to extend the limitations to all the sons of his nephew. If the word first had been omitted, and the devise had been to the eldest son of my nephew and the heirs-male of his body, there could have been no question of their being words of limitation; but it is said that the words being to the first heirs male make them words of purchase, and that they mean first son, and that this construction is strengthened by the words of limitation, "and the heirs-male of his body," which follow. But that the word first shall not have this effect has been decided in the case of *Dubber v. Trollop*. (2) "Sir *Thomas Trollop* devised lands to his son *Thomas* for life, and from and after his decease to the first heir-male of his body. It was held in the Common Pleas, that *Thomas* was tenant in tail, Chief Justice *Eyre* saying, that the words heir-male of his body made an estate-tail, and that the word first would not alter the case, and on a writ of error this judgment was affirmed in B. R." In the

(1) Sir *Joseph Jekyl*.

(2) 8 Vin. Abr. 233. Rob. Gavelkind, 96.

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present case the words are first heirs-male in the plural number, which shews that the testator intended that the estate should go in succession; neither shall the words of limitation which follow have the effect of making the first words of purchase, *Goodright v. Pullin*, B. R. 13 Geo. 1. (1) “*Nicholas Lisle* devised the premises to his wife for life, remainder to *Nicholas Lisle* for the term of his natural life, and after his decease to the heirs-male of the body of the said *Nicholas*, lawfully to be begotten, and his heirs for ever; but in case the said *Nicholas* should die without such issue-male, then he devises to his kinsman *Edward Lisle* for life, and after his decease to the heirs-male of his body lawfully begotten, and his heirs for ever; and in default of such heir-male, remainder over. It was held, that *Nicholas*, the first devisee, was tenant in tail.” In the present case, the argument arising from the subsequent words of limitation is defeated by the testator’s having used similar words of limitation; in the second clause of his will he devises to the second son of the said *Randal Minshull* and the heirs-male of his body *and their issues*; but supposing these to be words of purchase, if the eldest son of the testator’s nephew had had a son at the time, must not he and his son have taken a joint estate? It is clear, therefore, that the first devisee took an estate-tail, and that the limitation over cannot therefore be to his second son, but to the second son of his father, and that the plaintiff is therefore entitled.

Mr. Chute and Mr. Floyer for the defendant.

The *Randal Minshull*, of whom the testator is speaking, is the son of his nephew; the said *Randal Minshull* mentioned in the second clause, must therefore mean the same person. As to the argument that the word heirs is in the plural number, the words heir and heirs are convertible terms. As to the cases; in *Goodright v. Pullin*, there was not the word first; and in *Dubber v. Trollop*, there were no subsequent words of limitation added to the words heir-male of his body. According to the plaintiff’s construction, these subsequent words of limitation must be rejected, which is not to be done where a reasonable sense can be given to them. If *John*, the second son of the nephew was intended by these words, the testator has, by the last clause, directed that he should pay 20*l.* to himself. If this be not the true construction the devise must be void for uncertainty.

LORD CHANCELLOR.—This case will depend on the words of the will with regard to the person intended by the testator, by the name of *Randal*, and the legal operation of the words made use of; and a Court never construes a devise void, unless it is so absolutely dark, that they cannot find out the testator's meaning.

The provision for the payment of the legacies (by the person to whom the estate should come) to his brothers and sisters, and to *John*, &c., is, as has been insisted on for the plaintiff, a very strong expression of the intent of the party; for as here is a specification of the children, it must mean the brothers and sisters of *Randal Minshull*, the eldest son of *Randal Minshull* the nephew, and could never intend to mean every taker. For, supposing the words to mean the second son of the devisee, as there is plainly an estate-tail created prior to any interest he can claim, (whether the words first heirs-male are construed words of limitation or purchase), an estate which may continue for a great number of years, in all probability, without any failure of issue, it would be a most absurd thing to charge a person, at so great a distance from the estate, with the payment of money to persons then in being, whom the testator could hardly suppose would be living at the time of the title accruing to such second son. On the other hand there is nothing extraordinary in charging *Randal* the first devisee, or upon a supposition of his death without issue, in the life time of *John*, in charging *John* with the payment of those sums, which raises a very strong presumption, that *John* was the person intended to take under the limitation to the second son of *Randal*.

It has been objected against this construction, that *John* will then be devisee of the estate, and entitled to the 20*l.* likewise, which the testator could never intend; but the words must be taken *reddendo singula singulis*, and *John* to have the 20*l.* only in case of the first devisee's right taking effect in possession, and the determination of the preceding estates then in being at the time of making the will. It is much more natural likewise that the testator, when he was making a disposition of his whole estate, having a nephew who had two sons, should settle it successively on both the sons, than stop at the first, without extending the entail, or disposing of the reversion.

Whether the first devisee was tenant for life, or in tail, is a question proper to be considered, and the determination of

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A Court never construes a devise void, unless it is so absolutely dark that it cannot find out the testator's meaning.

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I am of opinion that the words of limitation superadded here to the preceding words of limitation, will certainly not of themselves, make the first words of purchase, but the subsequent ought to be rejected as redundant and superfluous.

In *Archer's* case, (1) an estate was limited to *Robert Archer*, the first taker, expressly for life, to which great regard is always had in determining whether an estate for life, or in tail, passes. 2dly, In that case it was to the next heir male of *Robert* only, not heirs as here; nor will the subsequent words of limitation affect the legal operation of the preceding words in any case of this kind, unless the word heir is made use of in the singular number, or there is an express estate for life limited to the first taker. It is true, in *Shelley's* case, (2) *Anderson*, Chief Justice, puts this case. "If there be a limitation to the use of a man for life, and after his decease to the use of his heirs, and of their heirs-female of their bodies;" in this case, these words (his heirs) are words of purchase and not of limitation, for then the subsequent words (and of their heirs-female of their bodies) would be void. That appears to be a case only put by *Anderson*, and no resolution of that kind; but besides these the subsequent words vary essentially the preceding limitations, and alter the course of succession and enjoyment of the estate.

There are subsequent words of limitation annexed likewise to the devise to the second son, which shews the testator had no intention they should operate in destruction of the former words. No stress at all is to be laid on the word first; there are many authorities for that purpose, and the case of *Dubber v. Trollop* is a very strong one; there the word heir too was used, not heirs. The word first means only that they should take in succession, according to priority of birth and seniority of age, and is unnecessarily providing for what the law itself does.

Decreed for the plaintiff. (3)

(1) 1 Co. 66 b.

(2) 1 Co. 93 b., and 95 b.

(3) Decreed that the premises were devised in remainder to *John Minshull*,

the second son of *Randal Minshull* the father, which *John* was father of the now plaintiff. Reg. Lib. B. 1737. fo. 144.

BARTHOLOMEW v. MAY.(1)

February 7th, 1737.

THE testator *Thomas May*, having by indenture of mortgage, 1 Atk. 486. dated the 24th June, 1723, mortgaged an estate at *Hadlow* ^{A. having} mortgaged certain lands, devises them to *R. M.* in tail, and devised other lands to *T. M.*, subject to the payment of his debts, in case his personal estate should not prove sufficient. The 1,300*l.* must be paid as a debt out of the testator's personal estate,(2) and, if deficient, out of the real estate so devised to *T. M.* Where a mortgage is made by a person who is owner of the estate, that mortgage is looked upon as a general debt, and the land only as a security; and therefore personal estate shall be applied in discharge, but if the contest lay between *R. M.* and creditors of the testator, it would have been otherwise.

(1) This case, with some additions to the statement from Lord *Hardwicke's* Note-book, is taken from *Atkyns*.

(2) So *Howel v. Price*, 1 P. Wms. 294. *Cope v. Cope*, 2 Salk. 449. *Pockley v. Pockley*, 1 Vern. 36. *King v. King*, 3 P. Wms. 358. *Galton v. Hancock*, 2 Atk. 438. *Robinson v. Gee*, 1 Ves. 251. *Astley v. Tankerville*, 3 Bro. Ch. Ca. 545. And the personal estate shall be applied in exoneration of a mortgage, made by the owner of the estate as against executors or residuary legatees, *Cutler v. Coxeter*, 2 Vern. 302. *Rider v. Wager*, 2 P. Wms. 334. *Philips v. Philips*, 2 Bro. Ch. Ca. 273.; but not against creditors, specific or pecuniary legatees, *Cope v. Cope*, 2 Salk. 449. *Robinson v. Gee*, 1 Ves. 251. *O'Neal v. Mead*, 1 P. Wms. 693. *Tipping v. Tipping*, ib. 730. *Lutkins v. Leigh*, Cases temp. Talbot, 53. *Scott v. Beecher*, 5 Madd. 96. But if the estate comes to another person (either by descent or purchase) subject to the mortgage or charge, then his personal estate shall not be applied in exoneration of the real estate, although upon the transfer of the mortgage, or for the purpose of securing the charges, he covenants to pay the mortgage or the charge, *Forrester v. Leigh*, Amb. Rep. 174. *Evelyn v. Evelyn*, 2 P. Wms. 664; and see the cases cited in Mr. *Cox's* note to that case, *Bagot v. Oughton*, 1 P. Wms. 347. *Leman v. Newnham*, 1 Ves. 51. *Lacam v. Mertins*, 1 Ves. 312. *Robinson v. Gee*, 1 Ves. 251. *Tweddell v. Tweddell*, 2 Bro. Ch. Ca. 101. *Billinghurst v. Walker*,

ib. 604. *Hamilton v. Worley*, 2 Ves. jun. 62. *Waring v. Ward*, 7 Ves. 336.; unless by his acts it can be inferred that he intended to make the debt his own personal debt, as where a purchaser agreed with the vendor for the purchase of an estate at 90*l.* which was then mortgaged at 86*l.*, and covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor, *Parsons v. Freeman*, Amb. Rep. 116. *Lord Oxford v. Lady Rodney*, 14 Ves. 417. Or where father and son, being entitled to an estate, join in raising money by mortgage of the estate, for the benefit of the son, and jointly covenant to pay the mortgage money; the son afterwards sells his interest in the estate to the father, in consideration of the father's taking upon himself the payment of the mortgage and the arrears, and the father subsequently borrows a further sum, and makes a new mortgage of the estate for the original and further sum, *Woods v. Huntingford*, 3 Ves. 130. If the owner of the estate however creates a charge in its nature real, and intends the covenant only as an additional security, in such case the land shall be applied in discharge of the incumbrance as the primary fund; as where a party by marriage articles covenants to settle lands for raising portions for younger children, and gives a bond for performance of the articles, *Edwards v. Freeman*, 2 P. Wms. 438. *Lady Coventry v. Lord Coventry*, 2 P. Wms. 222. and 9 Mod. 12. *Lechmere v. Charlton*, 15 Ves. 193.

BARTHOLOMEW v. MAY. for 1,300*l.* did by his will of the 10th of April, 1724, devise the same estate at *Hadlow* to *Richard May* in tail, remainder over, &c. and devised other lands to *Thomas May*, subject however to the payment of his debts, in case his personal estate, and other estates devised for that purpose, should not prove sufficient to satisfy all the debts, and he made *Richard May* the executor of his will, and towards payment of his debts and legacies he gave all his ready money, goods, and corn, and chattels, not thereinbefore otherwise disposed of.

Feb. 7th, 1737. LORD CHANCELLOR.—I am of opinion that the 1,300*l.* must be paid as a debt of the testator out of the personal estate; or, if that proves deficient, out of the real estate so devised; for wherever there is a mortgage made by a person who is owner of the estate, that mortgage is looked upon as a general debt, and the land only as a security, and therefore the personal estate shall be applied in discharge of the 1,300*l.*, though there may be younger children of the mortgagor who may be no otherwise provided for: but I think clearly the case would be otherwise, if the contest was between *Richard May* and any creditors of the testator, who would lose their debts, if the mortgage was so paid off out of the personal assets, or the money arising from the sale of lands devised for that purpose.

In the case of *Lovel v. Lancaster*, 2 Vern. 183., it is laid down otherwise, that the devisee of the mortgaged estate shall take it *cum onere*; but I do not pay any great regard to it, because it does not appear whether there was a sufficiency of assets or not to satisfy the rest of the creditors.

N. B.—His Lordship said in this case, that where a testator devises expressly that the timber upon a particular estate shall be cut down for payment of debts, it is a hardship upon the first taker of the estate; but he must submit, for here the timber is devised one way, and the estate another; for the timber is devised to *Richard May* and his heirs upon trust, to cut down and sell for discharge of debts, &c.; and this is the strongest case that can be of the kind, but the devisee of the estate may buy, and so prevent the defacing of the estate.

His Lordship declared that the mortgage for 1,300*l.*, on the testator's estate at *Hadlow*, and interest thereof, is a debt of the testator's to be satisfied out of his personal estate and trust estate, in case the same shall be sufficient to satisfy all the debts; but in case they should not be sufficient to pay

his debts, funeral expences, and legacies, then his Lordship reserved the consideration of all further directions.(3)

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(3) Reg. Lib. A. 1737. fo. 411.

HUTCHINS v. LEE. (1)

February 8th, 1737.

BILL brought to set aside an assignment of a leasehold estate, and all other the estate and effects of the plaintiff, upon a suggestion that the same was never intended as an absolute assignment for the benefit of the defendant, but made only to ease the plaintiff of the trouble and care of managing his own concerns at that time, (being then under great infirmities of body and mind,) and subject to a trust for the benefit of the plaintiff, if he should afterwards be in a capacity of taking care of his own affairs.

1 Atk. 447.
Bill brought to set aside an assignment of a leasehold estate, &c. upon suggestion that it was not intended as an absolute assignment, but subject to a trust for the plaintiff's benefit.

The deed of assignment recited that the plaintiff by reason of a long sickness and infirmity of body, found himself incapable of managing his estate without great disadvantage, and that the defendant was very serviceable to him in purchasing the estate, and had undertaken to pay off all such debts as he should owe to the amount of 160*l*. The plaintiff assigned to the defendant two leasehold tenements, except the malt-house and some rooms in one of the houses, to hold to the defendant for the residue of the term; defendant performing and paying all covenants and high rents, and paying the clear rent of 40*l*. *per annum*, free of all rates, taxes, &c. The plaintiff also assigned all his live and dead stock to the defendant for his own use. There was a general covenant in the deed from the defendant, to indemnify the plaintiff against any breach of covenant in the original lease, and a special reservation to the plaintiff of all the timber, &c. and

Though no express trust in the deed, yet as it might be collected from circumstances arising out of the assignment itself inconsistent with an absolute disposition; the Lord Chancellor admitted parol evidence to explain this transaction.

(1) This case has been taken from *Atkyns*, with the addition of the substance of the deed of assignment from Lord Hardwicke's Note-book. It appears that evidence of conversations and declarations by the defendant were ad-

mitted; that there was also evidence of the plaintiff's insanity; but no mention is made of any reservation of timber, as stated in *Atkyns*; and it will be observed that the assignment was of leasehold premises.

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he to set out, and allow timber for the repair of the estate, (2) (a circumstance principally relied on by the *Lord Chancellor*, as not at all reconcileable with an absolute disposition of the whole interest to the defendant,) and other circumstances raising a strong presumption of a trust intended.

March 4, 1737.

Though there can be no parol declaration of a trust since the 29th Car. 2. yet parol evidence proper in avoidance of fraud.

LORD CHANCELLOR admitted parol evidence to explain this transaction, viz. declarations by the defendant at the time the deed of assignment was executed, and afterwards amounting to an acknowledgment of such a trust as the plaintiff now insisted on; and his Lordship said, such evidence was consistent with the deed, as there was all the appearance of an intended trust upon the face of it; but however, though there can be no parol declaration of a trust, since the statute of the 29th Car. 2.; yet this evidence is proper in avoidance of fraud, which was here intended to be put on the plaintiff; for the defendant's design was absolutely to deprive the plaintiff of all the benefit of his estate. (3)

(2) These covenants do not appear either in *Lord Hardwicke's* Note-book, or the Register's Book.

(3) The *Lord Chancellor* adds the following note. I was of opinion, that it was not intended, that the conveyance should be an absolute conveyance, but that the plaintiff should have a re-assignment of his estate, if he should become capable of managing, and should demand it. Decree re-conveyance and

account, but to stand over for judgment till some day between the seals, and parties to answer whether they would set the personal estate against the debts, and the 40*l. per annum* against the profits, and take the account of the profits only from the time of the last payment of the 40*l. per annum*, 4th March, 1737. Decree pronounced by consent, according to these proposals.*

* It appears from the Register's Book, that the decree was made by consent, in conformity with these proposals. Reg. Lib. A. 1737. fol. 406.

DUNCALF v. BLAKE. (1)

February 8th, 1737.

THE plaintiff subscribed a policy of insurance for a considerable sum of money; the ship was lost, and, as suggested, fraudulently, and with a view of charging the plaintiff with the policy.

1 Atk. 52.

An insurer by his bill suggests the ship was lost fraudulently, and

in the charging part mentioned that, instead of proper goods, there was only wool on board; and, in the interrogatory part prays defendant may set out what kind of goods he had on board. The defendant pleads several statutes making it penal to export wool in bar to a discovery of all kind of goods on board; and the plea is allowed, (2) and it was agreed that a plea may be bad in part, and yet not so in the whole. (3)

The bill sets forth, that the ship, instead of having proper mercantile goods on board, being bound from one of the ports of *Ireland*, to one of the ports in *France*, had only wool on board. By the interrogatory part of the bill it was prayed, that the defendant might set out what kind of goods he had on board, what the invoices were, in what manner the ship was cleared, and whether she had not arms on board her.

The defendant, as to so much of the bill as sought a discovery of the particular nature and quality of the goods mentioned to be shipped on board the said ship to be sent to *France*, and insured by the said plaintiff, as in the bill mentioned, or which seeks to discover what kind of goods were loaded, or whether the goods on board were wool, or any other particulars relating to the same, or when and where she cleared out after taking in her said loading, or as to any letters, bills of lading, or invoices, relating to the said cargo, or the management, sale, or disposal thereof;

(1) This case is taken from *Atkyns*, it does not appear in Lord *Hardwicke's* Note-book.

Smith v. Read, ante, p. 16. *Earl of Suffolk v. Green*, post. *Chauncey v. Tahourden*, 2 Atk. 392. *Bishop of London v. Fytche*, 1 Bro. Ch. Ca. 96. *Cartwright v. Green*, 8 Ves. 405. *Ex parte Symes*, 11 Ves. 525. *Claridge v. Hoare*, 14 Ves. 59.

(2) It is a rule of law, that a man shall not be obliged to discover what may subject him to a forfeiture, *Harrison v. Southcote*, 1 Atk. 539. *Honeywood v. Selwin*, 3 Atk. 276. *Bird v. Hardwicke*, 1 Vern. 109. *Sharp v. Carter*, 3 P. Wms. 375. *Boteler v. Allington*, 3 Atk. 457. *East India Company v. Campbell*, 1 Ves. 247. *Brownword v. Edwards*, 2 Ves. 243. *Chetwynd v. Lindon*, 2 Ves. 451.

(3) So *Earl of Derby v. Duke of Athol*, 1 Ves. 205. *Bishop of Sodor and Man v. Earl of Derby*, 2 Ves. 357. *Mayor and Corporation of London v. Levy*, 8 Ves. 402. *Baker v. Mellish*, 11 Ves. 70.

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pleaded an act of parliament of the 1st of Will. and Mary, that no wool shall be shipped from *Ireland*, or imported from thence to any port but *Liverpool*, and some others in *England*; which was afterwards made perpetual by the 7th of Will. and Mary, and by another act of the 10th and 11th of Will. 3. it was enacted, that none shall directly or indirectly export from *Ireland* into any foreign dominion any wool, and all offenders against this act are made liable to the forfeiture of the said wool, and also to a forfeiture of 500*l.* for every offence. The value of the cargo on board the said ship, and insured by the plaintiffs, is by the policy ascertained at 3,500*l.* by the sum insured thereon, and therefore it can no ways concern the plaintiffs to know the particulars of the goods; but the discovery thereof may occasion several forfeitures, and the bill charging that the goods shipped on board, &c. by the defendant, were to be sent to *Pontraffe*, in *France*, which by the laws and statutes of this realm is prohibited, and highly penal, and the discovery manifestly tending to draw in the defendant to accuse himself; he submitted, whether he should be compelled to make any other answer.

The *Attorney-General*, for the plaintiff admitted, that, in the charging part of the bill, nothing was mentioned to be on board but wool; but, by the interrogatory part, defendant is asked in general, what kind of goods he had on board? and defendant's plea goes in bar to a discovery of all kinds of goods which were on board.

The LORD CHANCELLOR allowed the plea; but agreed, if other kind of goods had been mentioned in the charging part, the defendant might have been obliged perhaps, to have given some answer to it, but as there was not, defendant was not obliged to answer that interrogatory part. The only doubt he had was as to the clearing of the ship, and having arms on board, and that part of the bill he thought afterwards might be covered with the plea.

Agreed in this case, that a plea may be bad in part, and yet not so in the whole. (4)

HERRING *v.* YOE. (1)

February 8th, 1737.

A MARRIAGE settlement having been made of certain lands on the husband for life, remainder to the wife for life, with divers remainders over; the present bill was brought by the husband in order to have the opinion of the Court, whether a certain parcel of land was not intended to be included in that settlement.

There was an objection taken at the hearing of the cause, that the wife was not made a party.

LORD CHANCELLOR allowed the objection, for he said if the Court should be of opinion against the husband, such decree would not bind the wife; his Lordship therefore ordered the cause to stand over, that the wife might be made a party. (2)

1 Atk. 290.
A husband tenant for life, remainder to his wife for life, he brings a bill alone for the opinion of the Court upon the settlement; objection for want of making the wife a party allowed.

(1) This case is taken from *Atkyns*. Note-book.
It does not appear in Lord *Hardwicke's*

(2) Reg. Lib. A. 1737. fol. 198.

CLERK *v.* WRIGHT. (1)

February 8th, 1737.

THE plaintiff had agreed for the purchase of an estate of the defendant, but the agreement was not reduced into writing; however, in confidence of the agreement, plaintiff had given orders for conveyances to be drawn and engrossed, and went several times to view the estate: some time after the defendant sent a letter to the plaintiff, informing him, that at

orders for conveyances to be drawn, and went several times to view the estate, this Court will not carry such agreement into execution, and the statute of Frauds may be pleaded to a bill brought for that purpose.

1 Atk. 12.
A. agrees for the purchase of an estate, but the agreement not reduced into writing; though A. in confidence thereof gave

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.

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the time he contracted for the sale of the estate, the value of the timber was not known to him, and that the plaintiff should not have the estate, unless he would give him a larger price.

The bill was brought to carry the agreement into execution, to which the statute of Frauds afterwards was pleaded.

A letter is not a sufficient evidence of the agreement, unless the terms of the agreement are mentioned therein, but where a man takes possession in pursuance of an agreement, the Court will decree an execution of it.

LORD CHANCELLOR allowed the plea, and observed the letter could not be sufficient evidence of the agreement, the terms of the agreement not being therein mentioned. (2) As to the objection that this agreement was in part performed, he allowed, that when a man takes possession in pursuance of an agreement, (3) or does any act of the like nature, the Court will decree an execution of it, but the circumstances only of giving directions for conveyances, and going to take a view of the estate, he thought not sufficient. (4) (5)

(2) *Seagood v. Meale*, Prec. Ch. 561. 1 Str. 426. But if a letter contains the terms of an agreement, or refers to a paper which contains the terms, it is a sufficient written agreement to take it out of the statute of Frauds. See Prec. Ch. 374. Gilb. Eq. 35. *Moore v. Hart*, 1 Vern. 110, 201. 2 Cha. Rep. 284. *Wankford v. Fotherly*, 2 Vern. 322. *Finch v. Earl of Winchelsea*, 1 P. Wms. 277. *Welford v. Beazley*, 3 Atk. 503. 1 Ves. 8. *Allan v. Bower*, 3 Bro. Cha. Ca. 149. *Tawney v. Crowther*, ibid. 161. and 318. And see *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(3) Payment of a considerable part

of the purchase-money has been considered as an act of part performance, *Lacon v. Mertins*, 3 Atk. 4. *Main v. Melbourn*, 4 Ves. 720. *Buckmaster v. Harrop*, 7 Ves. 341., but in *Clinan v. Cooke*, 1 Sch. & Lef. 40., Lord Redesdale denies that payment of the purchase-money is an act of part performance; and see ex parte *Hooper* in the matter of *Hewett*, 1 Mer. Rep. 9.

(4) See *Hawkins v. Holmes*, 1 P. Wms. 771., and *Stokes v. Moore*, 1 Cox 219. *Whaley v. Bagnall*, 6 Bro. P. C. 45. *Redding v. Wilkes*, 3 Bro. C. C. 400.

(5) Reg. Lib. A. 1737. fol. 188.

PHIPPS v. STEWARD. (1)

February 9th, 1737.

SIR ROBERT COWAN, intending to leave *Bombay*, declared 1 Atk. 285.
 to the plaintiff he had made his will, and that after giving While a suit is
 depending in
 the Ecclesiastical Court for an administration, a bill may be brought here for an account of
 the personal estate. The reason why a bill is allowed to be brought before probate, is that the
 Ecclesiastical Court have no way of securing the effects in the mean time.

A devise of personal estate to A., and the heirs of her body, it has never been solemnly determined, that where money is so entailed, the whole shall go to the first taker.

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book. It appears from the Register's Book, that the plaintiffs brought their bill against the defendants, alleging by their bill, that Sir *R. Cowan*, for many years, resided at *Bombay*, and being about to sail for *England*, made his will, dated the 4th of Jan. 1734, and after giving some legacies thereby, bequeathed the residue of his estate, after payment of his debts and legacies, to be laid out in the purchase of lands to be settled to the use of his brother, *Wm. Cowan*, in tail, remainder to his sister in tail, remainder to the plaintiffs in fee; and appointed the said *Wm. Cowan* executor, and directed in case of his brother's death, that his personal estate should be remitted to the plaintiffs for the purposes aforesaid. That Sir *R. Cowan* soon afterwards sailed for *England*, but for fear of accident, left his will with his secretary, and only brought over a copy to *England*, but directed his secretary to send over the original as soon as he had notice of Sir *R. Cowan's* arrival. That Sir *R. Cowan* died in Feb. 1736, without revoking his will, and without having received the original. That the said defendant, *Alexander Steward* had been informed by Sir *R. Cowan*, of his having left his will at *Bombay*, and that only a copy would be found in *England*; and on searching among the papers of Sir *R. Cowan* after his death, a copy being only found, no further search was made for the original. That all the said Sir

R. Cowan's papers were thereupon sealed up with the consent of the plaintiffs, and the said defendant *Alexander Steward*, and it was agreed between them, that the same should not be further inspected or meddled with by any persons until the will should be brought into *England*, or there should be a proper representative of Sir *R. Cowan* appointed. That advice was soon after the death of Sir *R. Cowan* received of the death of *Wm. Cowan* in the lifetime of the said Sir *R. Cowan*; and the said defendant, *Alexander Steward*, afterwards married the sister, and applied for letters of administration for her, as if Sir *R. Cowan* had died intestate. That a suit is now depending in the Ecclesiastical Court touching the same; and pending the proceedings there, the defendants had contrary to the said agreement, broke open the seals and possessed themselves of all the personal estate, books, papers, and writings, of Sir *R. Cowan*, and applied the same to their own uses, and had squandered away part thereof, and threatened to carry over the rest thereof to *Ireland*, and to secrete themselves, or dispose thereof there for their own uses. That the said original will was not likely to be got from *Bombay* till the ensuing August, and they prayed by their bill, that Sir *R. Cowan's* personal estate might be brought into Court, and laid out in the South Sea Annuities, until a convenient purchase could be found in which to invest the same according to his will, and that until the

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his personal estate to his daughter, and the heirs of her body, he had limited the same to the plaintiff.

Some time after Sir *Robert Cowan* died, the daughter married the defendant, and upon a supposition that there was no will, administration was applied for by the daughter in the Spiritual Court; pending a suit there, the present bill was brought by the plaintiff to have an account of the personal estate.

To this bill the defendant demurred, for that there was a suit now depending in the Spiritual Court for administration to the personal estate of Sir *Robert Cowan*.

LORD CHANCELLOR over-ruled the demurrer; and said, in the case of *Powis v. Andrews*, a bill of this nature was allowed before probate, and that determination was founded on a former case of *Japhet v. Crooke*, in the time of Lord *Harcourt*, relating to the will of Mr. *Hawkins*. (2)

The reason for these cases is, that the Ecclesiastical Court have no way of securing the effects in the mean time, (3) nor did he know there was any solemn resolution, where money is entailed in the manner the testator has done here, that the whole of it shall go to the first taker. (4) The case of *Colwal v. Shadwell*, in the time of Lord *Cowper*, is to the contrary, 1 P. Wms. 470, 485.

said will could be got from *Bombay*, that the defendants might be restrained from proceeding in the Ecclesiastical Court to get administration to Sir *R. Cowan* as dying intestate. To this bill the defendants put in a demurrer, which was over-ruled, and the defendants were restrained from receiving and alienating any part of the said testator's personal estate, till further order. Reg. Lib. B. 1737. fol. 135.

(2) So *Dulwich College v. Johnson*, 2 Vern. 49.

(3) Pending a litigation, the property is often in danger of being lost or injured; in such cases a court of equity will interpose to preserve it, if the powers of the court where the litigation is pending are not sufficient for that purpose, *Mitford's Pleadings*, p. 122. *Andrews v. Powys*, 2 Bro. P. C. 476. *Morgan v. Harris*, 2 Bro. C. C. 121. *Montgomery v. Clarke*, 2 Atk. 378. *Smith v. Aykwell*, 3 Atk. 566. *King v. King*, 6 Ves. 172. *Richards v. Chave*, 12 Ves. 462. *Edmunds v.*

Bird, 1 Ves. & Bea. 542.

(4) Where money is directed to be laid out in land to be settled in such way as to make it necessary that a recovery should be suffered; in order to give the remainder-man his chance, the Court has always directed it to be laid out in land. See *Benson v. Benson*, *Short v. Wood*, *Chaplin v. Horner*, 1 P. Wms. 131, 471, 483. *Eyre's* case, and *Onslow's* case, 3 P. Wms. 13. *Collet v. Collet*, 1 Atk. 11. *Cunningham v. Moody*, D. 1 Ves. 176., and even where under Lord *Eldon's* act, or under the 7th Geo. 4. c. 45., which has repealed Lord *Eldon's* act, the money may be paid over to the persons entitled without being invested in lands; yet where a recovery is necessary, the money will not be paid to the party until such time as he might have suffered a recovery, *Fletcher v. Tollet*, 5 Ves. 12., see note to that case. Ex parte *Bennett*, 6 Ves. 116., and see ex parte *Sterne*, ib. 156. Ex parte *Rees*, 3 Ves. and Bea. 11

His Lordship restrained the defendants from receiving any more of Sir *Robert Cowan's* personal estate till further order.

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MORGAN *versus* MORGAN. (1)

February 10th, 1737.

LORD CHANCELLOR.—Where any person, whether a father or a stranger, enters upon the estate of an infant, and continues the possession, this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined; but from the inconveniency of such long accounts, whenever it comes in proof, that the infant, after being of age, has waived such account, this Court will lay hold of any such thing to put an end to it; though, indeed, in the case of a father, the Court is not so strict, as imagining the parental authority might hinder the bringing any bill or ejectment to recover the possession.

1 Atk. 489.

Where any person enters upon an infant's estate and continues the possession, this Court considers him as a guardian and will decree an account, and to be carried on after the infancy is determined, unless the infant after being of age waived such account.

(1) The above note of the *Chancellor's* opinion is taken from Mr. *Atkyns's* Report.

It appears that the bill in this case was by an eldest son against the representatives of his father for an account of the rents and profits of an estate of which the plaintiff's mother under a settlement of 1690, was tenant for life, remainder to her first and other sons in tail. The mother died in 1707, upon which the father entered and occu-

piated the premises till his death, in 1729, insisting that he was entitled to them for his life. It appeared that the plaintiff had been apprized of the settlement of 1690; and that it had been in his possession for eight years before his father's death; and that his father had maintained him and his family for some time after his marriage. He was forty-six years of age and had been married ever since 1720. The bill was dismissed without costs.

LONDON ASSURANCE COMPANY . Plaintiffs; (1)

and

JOHN JOHNSON, PETER CARDON,
CHARLES GHYSWHICK, JAMES
MELCAMP and THE EAST INDIA
COMPANY } Defendants.

Feb. 10th, 20th, and 21st, 1737.

An insurance
having been
effected by the
defendant

Johnson whith

the plaintiffs on a ship and cargo from *Ostend* to *Canton*, was seised by the *East India Company* at *Bencoolen*, as an illicit trader; *Johnson* recovered in an action on the policy against the insurers and obtained judgment; upon a bill by the insurers against the defendants to be relieved against the verdict and judgment, or that the insurers might stand in the place of *Johnson* to receive satisfaction against the *East India Company* for any unlawful capture made by them; held, that they could not be relieved against the verdict and judgment; for if the seizure were lawful that would have been a good defence to the action; and that the insurers could not stand in the place of *Johnson* to receive satisfaction against the *East India Company*, as there was no proof in the cause against the Company that *Johnson* had any interest or property in the ship or goods.

ON the 15th of December, 1720, the defendant, *Johnson*, effected an insurance with the plaintiffs, on a certain ship and cargo, from *Ostend*, in *Flanders*, to *Canton*, in *China*.

The ship having come into the road at *Bencoolen*, was seised, on the 20th of August, 1721, by the Governor and Council as an illicit trader, and sold for 3,600*l.* which the *East India Company* admitted they had received.

Johnson brought an action, on the policy, against the *Insurance Company*, and in Easter Term, 1730, recovered 3,600*l.* and 170*l.* costs.

The bill prayed relief against the verdict and judgment obtained by *Johnson*, or that the plaintiffs might stand in the place of *Johnson* to receive satisfaction against the *East India Company* for any unlawful capture made by them.

It was not proved that *Johnson* had any property in the ship or cargo, nor did it distinctly appear in whom the property was vested. Some evidence was offered on the part of the *East India Company*, that the captain and mate were *Englishmen*, and that some of the cargo came from *England*.

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book.

The judgment from the heads of it in his Lordship's hand-writing.

Mr. *Attorney-General*, Mr. *Clarke*, and Mr. *Murray*, for the plaintiffs.

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If the capture was lawful the risk was not within the policy, *Molloy* 244., 2 Vern. 176., and the plaintiffs are entitled to relief against the judgment at law ; and if the capture was unlawful the plaintiffs have a right to stand in the place of *Johnson* to receive satisfaction from the *East India Company*.

This resembles the case of *Morrice v. The Bank of England*, Cas. temp. Talbot 217; the real parties ought to interplead. At the time of this insurance there was no law here against the *Ostend* trade, and the act of Geo. 1st. does not prohibit the insuring on those ships.

Mr. *Hamilton* and Mr. *Clarke*, for *Johnson* and *Cardon*.

The seizure was without colour of right; but if the insurers had any defence they might have availed themselves of it at law.

There is no more ground to relieve in this case than in a case of mispleading, *Anon.* 1 Vern. 119. *Curtis v. Smalridge*, 1 Ch. Ca. 43. This is not an interpleading bill.

Mr. *Browne*, Mr. *Fazakerley*, and Mr. *Weldon*, for the *East India Company*.

The plaintiffs pray relief against the *East India Company* upon a supposition, that the seizure was unlawful. By the 9 & 10 W & M. c. 44. s. 81. 6 Anne, and 7 Geo. 1., the exclusive benefit of trading is secured to the Company, and all persons intruding into the limits of their exclusive trade, are considered as traders; and the power is given to seize ships, &c. for unlawful trading. *Johnson* is alleged in the bill to be a merchant of *London*. It was not before pretended that he was only a trustee for foreigners. It is not, indeed, proved that *Johnson* or *Cardon* have any interest or in whom the legal interest is vested. Great mischief would arise from permitting *Englishmen* to insure foreign ships trading within the Company's limits; but it is proved that the master and mate were *English*, and that the cargo came from *England*. The seizure was therefore perfectly legal, 2 Ch. Ca. 95., case on the charter of the *African Company*; but if it was not so, the plaintiffs might have had a defence at law. The object of this bill is to compel one man to bring an action of trespass against another. This sort of relief is not ordinarily granted in cases of tort; but if granted the Company will be entitled to every defence

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which the original trespassers might have availed themselves of as against the original proprietor. We have insisted upon the statute of Limitations by the answer.

Pyke, the governor by whom the seizure was made, pleaded it to a former suit; and the plea was allowed. The Company are equally entitled to have the benefit of this defence.

Mr. *Attorney-General*, in reply.

Cases upon policies of insurance differ from all others as to the relief this Court will grant against verdicts. *Bonham v. Barber*, the plaintiff could not prove his case at the trial, but upon a bill being brought a trial was directed by this Court. It is said that this trading was contrary to treaties; but this Court cannot judicially take notice of treaties. The act 9 & 10 W. 3. c. 44. cannot affect foreigners; and the insurance of foreign ships is not within the act. The plaintiffs are entitled to relief, and have no remedy but in this Court. As to the statute of Limitations our right did not commence till the recovery against us.

Feb. 22, 1737.

LORD CHANCELLOR.—The plaintiffs pray, by their bill, relief in the alternative, either 1st, That they may be relieved against the verdict and judgment which has been obtained against them, at law, by the defendant *Johnson*, or 2dly, If they do not prevail in that, then that they may stand in the place of *Johnson* to have satisfaction against the *East India Company* for their interest in the ship and goods.

It is taken to be clear on the part of the plaintiffs that they are entitled to the one or the other of these kinds of relief; but that is not so clear to me.

1st. As to the first, it originally depends upon the question, whether the trading, the act of the assured, which occasioned the seizure, was lawful or not. Whether it was a breach of the policy is a question proper to be tried at law, and which in fact has been already tried there, between the defendant *Johnson* and the plaintiffs.

Suppose that this was a question which could be re-examined in a Court of Equity, there is no colour of proof made by the plaintiffs against *Johnson* or any of the defendants but the *East India Company*, that the seizure was unlawful, for the only proof attempted rests upon the answer of the *East India Company*, and the evidence of witnesses examined for them, which cannot affect a co-defendant. This is nothing like an interpleading bill, for the de-

defendants do not all claim the same debt or demand against the plaintiffs.

There is no ground then to give any relief in this Court against these defendants on the merits.

The only question as to them is, whether there is a sufficient foundation to direct that the plaintiffs may make use of their names to bring an action at law. I think that there is not, because, 1st. It does not appear in whom the legal interest is, and indeed it is agreed that it is not in *Johnson*. It is said to be either in *Cardon* or *Melcamp*, but that does not distinctly appear; and if entitled to part, it is clear that they are not entitled to the whole.

It appears by the assignments, that this ship and cargo were divided out into shares like stock; but one partner cannot bring the action, all must join, and all should have been brought before this Court. It would, therefore, be a vain direction.

Secondly, Because the action is bound by the statute of Limitations. The seizure was in 1721; the action on the policy was not till 1729. It is said that the plaintiffs had no right till that action had been brought; but the defendants, the *East India Company*, are entitled to the same defence as if the action had been brought against them by the original proprietors. There is no ground arising from any delay of theirs to take away the benefit of any defence from them.

As to the other alternative in the prayer of the bill, that the plaintiffs may stand in the place of *Johnson*, to have satisfaction against the *East India Company* for their interest in the ship and goods; I am of opinion that there is no sufficient foundation for that relief.

The case at best is a very suspicious one. The insurance is by an English subject in his own name. If the trade was really such as there is reason to suppose it was, it is a direct infraction of the Act of Parliament. The words are "all subjects of his majesty, his heirs and successors." It does not, indeed, extend to lawful East India Companies, such as the Dutch; but the trade from *Ostend* is unlawful, contrary to treaties, and condemned by the legislature and the voice of the whole nation as greatly to the prejudice of the public. In the present case the master and mate have English names; and it is sworn that the witnesses have heard and believe that they were English born. If this be the real case, this method of insuring in *England*, if the insurers can come round on the Company, will be a way to make the

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Company pay for a breach of their own charter and privileges. Vide Lord *Nottingham's* case, *Brook v. Bradley*, 2 Ch. Ca. 95.

But this is matter only of strong or rather violent suspicion, and I shall not found my decree upon it, but on the want of that which the plaintiffs must have proved if the trade had been the most lawful in the world.

The relief prayed is by way of satisfaction for a trespass or tort in a Court of equity.

There is no proof against the Company that either *Johnson*, *Cardon*, or *Melcamp*, had any interest or property in the ship or goods.

There is no proof against the *East India Company* that *Johnson* was a trustee for any foreigner. He is alleged by the bill to be a merchant of *London*, and for any thing that appears to the Court, he might be an English subject residing here, insuring a share of his own in a ship from *Ostend* to the *East Indies*.

There is no ground, therefore, to make any decree for satisfaction to the plaintiffs against the Company, and the bill must be dismissed.

The only question which remains is as to costs to the *East India Company*.

It is plain that they have had this ship and cargo, which was of very considerable value, and so far they have profited; and as there are several defects on the plaintiffs' part, so there are some on theirs.

The treaties are not proved whereby to shew the trade to be clearly unlawful; and it is not fully proved that the master and mate were English born subjects.

If that had been shewn I should have given them their costs; but as that has not been done, and they have profited so greatly by the seizure, I shall give no costs.

PRINCE v. HEYLIN. (1)

February 10th, 1737.

THE testatrix in this case being a lessee for a term of years, of two houses in *London*, devised the same to her nephew, *John Prince*, Pewterer, and *John Heylin*, Clerk, generally; and the will goes on thus, "and my will and meaning is, that the rents of my said two houses shall be equally shared and divided between them, the said *John Prince*, and *John Heylin*, Clerk, as aforesaid." The testatrix soon after dies.

1 Atk. 492.

A testatrix devises two houses to *J. P.* and *J. H.* generally, and then says, my meaning is, that the rents of my two houses should be equally

shared between *J. P.* and *J. H.*; the devisees shall take as tenants in common, and not as joint tenants.

John Prince survived the testatrix, and died in 1721; ever since, the premises have been enjoyed by the defendant as the survivor.

The bill is now brought by the administrator of *John Prince*, to have an account of the rents and profits.

The question was, whether, by the words in the will, a joint-tenancy, or a tenancy in common, was created.

It was agreed clearly, that if the words "equally shared" (2) had been annexed to the thing itself, they would have created a tenancy in common, but insisted upon at the same time, that the former are plainly words of joint-tenancy, and the subsequent amount only to a direction in what manner the profits should be received during the lives of the devisees, viz., to each of them an equal share, which is saying no more than what otherwise the law would direct.

LORD CHANCELLOR.—I am clearly of opinion the devisees

(1) This case is taken from *Atkyns*. The only Note of this case in Lord *Hardwicke's* Note-book is "Decree, Tenancy in Common and Account."

(2) So the words, "equally divided" in a will create a tenancy in common, *Owen v. Owen*, post. *Heathe v. Heathe*, 2 Atk. 122. *Haws v. Haws*, 3 Atk. 525; and in the surrender of a copyhold estate, *Fisher v. Wigg*, per *Gould* and *Turton*, *Holt*, dissentient, 1 P. Wms. 18. And in deeds taking effect under the statute of uses, *Rigden v. Vallier*, 2 Ves. 252. Whether they

would have effect in conveyances at common law seems doubtful, see *Stones v. Heurtly*, 1 Ves. 165. *Idle v. Cook*, 1 P. Wms. 70.; and see the cases collected upon this subject in Mr. *Conventry's* note to *Watkins* on Copyholds, vol. 1. p. 138. So the words "to and amongst," *Campbell v. Campbell*, 4 Bro. Ch. Ca. 15, or "between" *Lashbrook v. Cock*, 2 Mer. 70., create a tenancy in common; and see *Cox v. Chamberlain*, 4 Ves. 631. *Reade v. Reade*, 5 Ves. 744. *Casterton v. Sutherland*, 9 Ves. 446.

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were tenants in common ; that had the testatrix expressly directed the rents to be shared during the joint lives of the devisees, it might admit of some doubt ; but with regard to the time, the latter part of the devise was as general as the former, and the word " rents " will as properly pass the interest in the houses, as any other word whatever. This is therefore a plain tenancy in common.

J. H. having, on the death of *J. P.* taken possession of the two houses as survivor, and enjoyed them ever since, must account for the rents as far back as the death of *J. P.*, and not from the filing of the bill.

With regard to the time the defendant is to account for the rents and profits, there having been no entry made, or demand of the rents, &c. it has been insisted on for the defendant, he ought to account only from the time of the bill filed ; now in the case of joint-tenants or parceners, there is a mutual trust between them, and they are accountable to each other, without regard to the length of time ; it is otherwise in the case of tenants in common, and this is an adversary possession maintained by the defendant against the plaintiff ever since the death of his intestate : however the Statute of Limitations is a bar to any demand further back than six years ; and by the 4 Ann. c. 16. s. 27., an action of account lies for one tenant in common against another, and such action is expressly mentioned in the Statute of Limitations, and as there is no remedy at law, there can be no reason for any in equity.

Ejectment not maintainable by a tenant in common against another without an actual ouster. If the statute of Limitations be neither pleaded, nor insisted on by the answer, you cannot have the benefit of such bar.

I am of opinion the defendant must account for rents and profits from the death of the intestate, the nature of the estate devised not admitting of an adversary possession, in regard of the privity that is between tenants in common. An ejectment is not maintainable by one tenant in common against another, without an actual ouster. (2) No advantage can be now taken of the Statute of Limitations, it not being pleaded by the defendant, or insisted on by his answer, which in all cases is necessary, (3) in order to have the benefit of such bar to the plaintiff's demand ; though, indeed, the Court sometimes, when there is a very stale demand, notwithstanding the statute is not pleaded, will in its discretion reduce that demand to a reasonable time, and makes use of the Statute of Limitations as a proper rule to go by in the exercise of that discretion.

(2) *Reading v. Royston*, 2 Salk. 423. *Fairclain* on the demise of *Empson v. Shackleton*, 5 Burr. 2604. *Doe ex dem. Fishar v. Prosser*, Cowp. 217. See *Doe* on demise of *Hellings*

v. Bird, 11 East 49.

(3) But advantage may now be taken of the Statute of Limitations by demurrer, *Foster v. Hodgson*, 19 Ves. 186.

WILLIAM BELLASIS, Administrator
of his late Wife BRIDGET, and Admin-
istrator *cum testamento annexo* of
MARY BILLINGSLEY, his late Wife's
Mother, and BRIDGET BELLASIS,
his Daughter

Plaintiffs; (1)

and

THOMAS UTHWATT and Others Trus-
tees of MARY BILLINGSLEY's Will,
the Sisters of the Whole and of the Half
Blood of MARY BILLINGSLEY, the
Executor of the surviving Trustee of the
Marriage Settlement of MARY BIL-
LINGSLEY and her Husband, and the
ATTORNEY-GENERAL

Defendants.

February 11th, 1737.

By a settlement made previous to the marriage of *Rupert Billingsley* with *Mary* his wife, dated the 13th August, 1713, 1 Atk. 426.
R. B. by mar-
riage settle-
ment, after

reciting that he was entitled to certain Exchequer annuities, that it was agreed that they should be settled upon himself and his wife for their lives, and then in trust for such child or children as he should have by his wife, to be disposed of amongst them in such shares and proportions as he should direct and appoint; and after the decease of himself and his wife without issue, in trust for his executors, administrators, and assigns; Assigns the annuities to trustees upon trust, to permit himself and his wife to receive the produce during their lives, and after their decease upon trust, to transfer the said annuities to such child or children of the marriage as he should by deed or will appoint, and in default of such child or children, then to his executors or administrators; *R. B.* by will gives his real and personal estate to his wife, subject to the payment of 200*l.* *per annum* for his daughter's maintenance, until she attains the age of eighteen, and then to the payment of 10,000*l.* for her portion; By will the wife gives the residue of her real and personal estate to her daughter in fee; but in case she should die before she should be of an age to dispose thereof, she gave the same to trustees and their heirs, to lay out 6,000*l.* for founding a hospital at *Drayton*; but in case her daughter should die unmarried, her desire was that her daughter should be buried there, and the residue above the 6,000*l.* to be divided amongst her own sisters and their representatives; Held that the daughter, being the only child of the marriage, was under the marriage settlement entitled to the Exchequer annuities, no appointment having been made by her father. That the legacy of 10,000*l.*, given by the father's will to his daughter, could not be taken to be in satisfaction for the Exchequer annuities. (2)

That the daughter having attained the age of eighteen was entitled to the residue of the personal estate bequeathed to her by the will of her mother; but having died before she attained twenty-one, the contingency had happened upon which the charge of 6,000*l.* for founding a hospital was to take effect; and that the daughter having married, the residue of the real estate, under her mother's will, after payment of the 6,000*l.*, was held to belong to the daughter, as heir at law to her mother.

(1) The statement of this case, the arguments of counsel, the substance of the decree, and the case of *Whitmore v. Weld*, are taken from Lord Hardwicke's Note-book. The judgment is compiled from three manuscript reports, compared with that of Mr. *Atkyns*.

(2) A court of equity leans against

BELLASIS after reciting that he was entitled to certain Exchequer annuities of 300*l.* *per annum* for ninety-nine years, and that it
 v. UTHWATT. was agreed that they should be settled in trust for himself

double portions. A portion to a child, by the will of the parent, if there is any other prior provision, is *primâ facie* a satisfaction, per Lord Alvanley in *Hinchliffe v. Hinchliffe*, 3 Ves. 527; and the same rule prevails whether the double portion be given by will or by deed, *Thomas v. Kemish*, 2 Vern. 348. *Bruen v. Bruen*, ib. 439. *Blois v. Blois*, 2 Ch. R. 162. *Ackworth v. Ackworth*, cited in 1 Bro. C. C. 307. *Byde v. Byde*, 2 Eden's Rep. 19. *Finch v. Finch*, 4 Bro. C. C. 38. But a bequest, to be considered as given by way of satisfaction, must be of the same nature, per Lord Hardwicke in this case, post page 280. Land cannot be considered as given in satisfaction for money, nor money for land, *Eastwood v. Vinke*, 2 P. Wms. 616. *Chaplin v. Chaplin*, 3 P. Wms. 229. *Goodfellow v. Burchett*, 2 Vern. 298. *Ray v. Stanhope*, 2 Cha. Rep. 169. *Saville v. Saville*, 2 Atk. 458. *Grave v. Lord Salisbury*, 1 Bro. C. C. 425. *Holmes v. Holmes*, ib. 555. *Forsight v. Grant*, 1 Ves. jun. 298.; and must be equally certain, a contingent legacy is not a satisfaction for an absolute portion, therefore a legacy payable at twenty-five years of age, but in case of marriage between twenty-two and twenty-five, then to the issue; but in case of the event of dying unmarried, then over, is not a satisfaction for a bond to be paid at twenty-one, *Jeacock v. Falkener*, 1 Cox's Cas. 37. and 1 Bro. C. C. 295. *Hanbury v. Hanbury*, 2 Bro. C. C. 352 and 529. *Bengough v. Walker*, 15 Ves. 514. But with respect to portions, this Court, which always leans against incumbering estates twice over, will overlook little circumstances of time, per Lord Hardwicke, *Clark v. Sewell*, 3 Atk. 98.; and see *Jesson v. Jesson*, 2 Vern. 255. *Thomas v. Kemish*, ib. 348.; and see *Hartopp v. Hartopp*, 17 Ves. 184. Secus with respect to debts, *Clark v. Sewell*, 3 Atk. 96, 98. *Richardson v. Greese*, 3 Atk. 67. *Haynes v. Mico*,

1 Bro. C. C. 129. *Adams v. Lavender*, 1 M'Leland & Young, 51. And both portions must come from one and the same person, Sir Robert Walpole v. Lord Conway, Barn. Rep. 153.; but see *Copley v. Copley*, 1 P. Wms. 147.

And it is a general rule that where a parent, or a person in *loco parentis*, gives a legacy as a portion, and afterwards upon marriage, or on any other occasion, advances a greater or equal sum, that sum shall be deemed a satisfaction of the legacy, see *Trimmer v. Bayne*, 7 Ves. 515. *Irod v. Hurst*, 2 Freeman, 224. *Hale v. Acton*, 2 Ch. Rep. 35. *Hartop v. Whitmore*, 1 P. Wms. 681. Pre. in Ch. 541. *Jenkins v. Powell*, 2 Vern. 115. *Scotton v. Scotton*, 1 Str. 235. *Biggleston v. Grubb*, post. *Monck v. Lord Monck*, 1 Ba. & Be. 298. *Dwyer v. Lysaght*, 2 Ba. & Be. 156. But the sum advanced must be equally certain with the legacy, and not depend upon contingencies, *Spinks v. Robins*, 2 Atk. 491. And where the advancement is made in satisfaction of a different claim, and given absolutely, but the legacy with limitations, the advancement shall not be a satisfaction of the legacy, *Baugh v. Reed*, 3 Bro. C. C. 191. *Roome v. Roome*, 3 Atk. 181. *Robinson v. Whitley*, 9 Ves. 577. But in order to apply these general rules as to double provisions, the donor must be a parent, or a person in *loco parentis*, Per Sir William Grant, *Wetherby v. Dixon*, 19 Ves. 412. And, therefore, no presumption of satisfaction arises between a putative father and illegitimate child, *Pye Ex parte*, *Dubost Ex parte*, 18 Ves. 140. *Wetherby v. Dixon*, 19 Ves. 407. *Richardson v. Elphinstone*, 2 Ves. jun. 464. *Powell v. Cleaver*, 2 Bro. C. C. 500. *Spinks v. Robins*, 2 Atk. 492. *Shudal v. Jekyll*, 2 Atk. 518. And it is the unquestionable doctrine of the Court, that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving

for life, then for his wife for life, and then in trust for such child or children as he should have by his said wife, to be disposed of to or amongst such children, in such shares and

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a portion; and if the father afterwards advances a portion on the marriage of that child, *though of less amount*, it is a satisfaction of the whole, or in part, per Lord Eldon, *Pye* Ex parte, *Dubost* Ex parte, 18 Ves. 151. Notwithstanding this authority, it is apprehended that there is no case in which the Court, in the absence of evidence, or intention expressed upon the instruments, whereby the double portions are given, has decided that *simpliciter* an advancement of a less sum by a parent to a child, will be a satisfaction *pro tanto* of a legacy of a larger sum given by the parent to that child; Or where there has been a prior provision by settlement, a smaller subsequent provision by will has been held to be a satisfaction *pro tanto* of the provision by settlement. It is to be observed that, in *Jesson v. Jesson*, 2 Vern. 255, the settlement was qualified by the terms, "unless preferred in my life." And in *Hoskins v. Hoskins*, Pre. in Ch. 263, evidence was admitted to prove that the latter sum was given in satisfaction. And in *Warren v. Warren*, 1 Bro. C. C. 310, it appeared upon the face of the will that the testator had forgotten the settlement. On the contrary, in *Savile v. Savile*, 16 Vin. Abr. 442, it was insisted, that in the case of double portions, there is no instance where the second provision is less than the first, that ever it was held a satisfaction; and *Tracy, J.*, held accordingly, and observed that in all the cases cited, the second sum was more, or at least equal to the first provision. And in *Warren v. Warren*, 1 Bro. C. C. 310, *Ashurst, J.*, says, "*Duffield v. Smith*, 2 Vern. 258, was held no satisfaction, because less." And Lord Thurlow, in *Hanbury v. Hanbury*, 2 Bro. C. C. 360, says, "Is there any case where the second portion has been held a satisfaction, that it was not a *plenary* portion, to take effect in all events." And Lord Northington, in *Byde v. Byde*, 2 Eden. Rep. 23, says, "The plaintiffs say, that

a double portion must, first, be a legacy equal to the portion;" secondly, equally beneficial; and, thirdly, *ejusdem naturæ* and certain; and it is true that where the question arises upon a simple devise of a legacy of a sum to a child, without the intimation of the amount and intended application of it—these are established rules. And it is stated to have been said by the Court, in *Grimes v. Alleyn*, that they had never gone so far as to deduct the less portion by will from the larger by gift, see *Hanbury v. Hanbury*, 2 Bro. C. C. 360. And in *Rawlins v. Powell*, 1 P. Wms. 297. *Barret v. Beckford*, 1 Ves. 520, the Court says, where a sum of money is given by settlement, and a like or greater sum is given by will, the Court has presumed satisfaction, thereby implying that a less sum would not be a satisfaction. And Mr. Cox, in his note to *Blandy v. Widmore*, 1 P. Wms. 324, states as one of the distinctions between satisfaction and performance, that in cases of satisfaction the presumption will not hold, where the thing substituted is less beneficial in amount, as satisfaction implies doing something equivalent.

A residue given by will cannot be taken as a satisfaction, *Barret v. Beckford*, 2 Ves. 520. *Alleyn v. Alleyn*, 2 Ves. 38. *Devese v. Pontet*, cited in Pre. Cha. 240. *Farnham v. Phillips*, 2 Atk. 215. *Freemantle v. Banks*, 5 Ves. 79. Though Lord Thurlow said that a residue should go in satisfaction of a portion, D. per Lord Thurlow, *Rickman v. Morgan*, 1 Bro. C. C. 63, but where a testator says, that he gives so much of his residuary estate as shall be of the value of 2,000*l.* whether that would not be a satisfaction of a portion of 2,000*l.*, *quære* per Sir William Grant in *Benough v. Walker*, 15 Ves. 515?

Distinctions have been established between cases of satisfaction and performance, see *Garthshore v. Chalie*, 10 Ves. 12. *Goldsmid v. Goldsmid*, 1 Swans. 219. *Wathen v. Smith*, 4 Mad. 325. *Adams v.*

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proportions as he should direct and appoint, and after the decease of the said *Rupert* and his wife, without issue, in trust for his executors, administrators, or assigns; the said Exchequer annuities were assigned to trustees upon trust, to permit the husband to receive the produce for his life, and if his wife should survive him, in trust for her for life, and after the decease of them both, upon trust to transfer the annuities to such child or children of the said *Rupert* and his wife, as he should by deed or will appoint, and in default of such child or children, then to his executors or administrators.

Bridget, the plaintiff's late wife, was the only issue of the marriage, and *Rupert Billingsley* the father, by his will dated the 28th of October, 1720, devised all his real and personal estate to his wife, her heirs and assigns, subject to the payment of his debts, and to 200*l.* per annum for his daughter's maintenance, until she should attain the age of eighteen years, and then to the payment of 10,000*l.* to his daughter for her portion; and in case his wife should marry again, he charged his estate with the further sum of 5,000*l.* for his daughter.

Rupert Billingsley died without making any appointment under the power reserved to him in the marriage settlement.

Lavender, 1 M'Lel. & Young, 51. and though it seems doubtful whether there can be a part satisfaction in the absence of evidence or intention; yet there may be a part performance; in a covenant to purchase and settle lands of a given value, a purchase is taken in fee in the name of the covenantor of lands of a less value; upon his death intestate, the purchase shall be considered as made in part performance of the covenant, *Lechmere v. Earl of Carlisle*, 3 P. Wms. 228. *Sowden v. Sowden*, ib. Mr. Cox's note, ib. *Deacon v. Smith*, 3 Atk. 323. *Attorney-General v. Whorwood*, 1 Ves. 540. *Davies v. Howard*, 5 Bro. Parl. Ca. 552. So where a husband covenants to leave his wife after his decease a sum of money, and dies intestate, her distributive share under the statute shall go, if greater or equal in performance, if less in part performance of the covenant, *Blandy v. Widmore*, 1 P. Wms. 324. *Lee v. D'Aranda*, 1 Ves. 1. And it makes no difference

whether the husband covenants to leave, or that the executors shall pay, per Lord *Hardwicke*, *Lee v. D'Aranda*, 1 Ves. 2; or whether the wife takes out administration or not, per Lord *Eldon*, in *Garthshore v. Chalie*, 10 Ves. 12. So a period of six months has been, in cases of satisfaction considered material, and in cases of performance little regard has been paid to it by the Court, *Garthshore v. Chalie*, 10 Ves. 8, and see *Sparkes v. Cator*, 3 Ves. 530; but where the husband covenanted to pay a sum within two years after marriage, and if he died his executor should pay; having died after the two years leaving a larger sum, it was held, there having been a breach of the covenant in his lifetime, a distributive share under the statute would not be a performance of the covenant, *Oliver v. Brighthouse*, cited in 1 Ves. 1.; and see *Garthshore v. Chalie*, 10 Ves. 12.; and see *Adams v. Lavender*, 1 M'Leland & Young, 51.

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Mary Billingsley, the widow, by her will, dated the 22d of July, 1727, after giving several legacies, gave and devised all the rest and residue of her real and personal estate unto her beloved daughter *Bridget*, her heirs and assigns; but in case she should die before she should be of an age to dispose thereof, then she gave and devised the same to her trustees and their heirs in trust to lay out 6,000*l.* to build a hospital at *Druryton*, for the maintenance of so many seamen's widows as the trustees should think proper, and in case her daughter should die unmarried, her desire was, that she might be buried there, and the residue above the 6,000*l.* to be divided amongst her own sisters and their representatives.

At the time of making this will, *Bridget*, the daughter, was about twelve years old. The mother soon afterwards died, and the daughter married the plaintiff, by whom she had one daughter, the other plaintiff, and died about the age of twenty.

The bill was filed by the husband and only child of *Bridget*, the daughter of *Mary Billingsley*, for an account of her personal estate, and of the rents and profits of her real estate, and for an assignment of the Exchequer Annuities mentioned in her marriage settlement.

The questions made were,

First, Whether, under the marriage settlement between *Rupert* and *Mary Billingsley*, *Bridget*, the only child, was entitled to the Exchequer annuities, no appointment having been made by the father.

Secondly, Whether, if she was so entitled, the legacy given to her by her father's will was to be considered as a satisfaction.

Thirdly, Whether having died under the age of twenty-one, she was entitled under her mother's will, to the residue of her real and personal estate.

Fourthly, Whether the contingency had happened upon which the devise over was to take effect.

Mr. Browne, *Mr. Murray*, and *Mr. Fazakerley* for the plaintiffs.

As to the first question, the only child of the marriage is clearly entitled to the Exchequer Annuities under the marriage settlement. The power reserved to the father was only to enable him to divide and apportion the annuities amongst his children, if he should have more than one. The annui-

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ties are reserved to his executors, not in default of appointment, but in default of children. *Davy v. Hooper*, 2 Vern. 665.

It is equally clear that the legacy given by the father cannot be considered as a satisfaction. There is no reason to suppose that such was the testator's intention. The annuities were a vested interest in the daughter. The legacy was not payable till the age of eighteen, which she might never have attained; and in the mean time she was entitled under the will only to an inferior annuity. Besides which the annuities and the legacy are things of a totally different species. *Saville v. Saville*, Sel. Cas. in Ch. 32; and 2 Atk. 458. *Atkinson v. Webb*, 2 Vern. 478. *Duffield v. Smith*, 2 Vern. 258. *Crompton v. Sale*, 2 P. Wms. 553.; and 1 Eq. Ca. Abr. 205. pl. 9. *Eastwood v. Vinke*, 2 P. Wms. 614.

But the principal question is that which arises from the words used by *Mary Billingsley* in her will, and upon which the title to the residue of her real and personal estate depends. The residue of both these estates is given in the same clause, and by the same words; but as they are of different natures, the same words may receive different constructions, as was said by Lord *Macclesfield* in *Forth v. Chapman*, 1 P. Wms. 664. As to the residue of the personal estate, there can be no doubt. The daughter married and lived till she was twenty years of age. She might have given it by will at fourteen years, and her husband might have aliened it.

The only difficulty is as to the real estate. The intention of the testatrix is plain. She could not have intended to disinherit her granddaughter. Her object was to give to her daughter the estate in fee; but as her daughter was at that time only between eleven and twelve years old, and might possibly die before any person could derive any title from her, she in that case gave it over to the charity and to her sisters. The words used in the will do not require that the daughter should be of an age to give by deed or will. The word is *dispose*, and not *give*, *cujus est dare ejus est disponere*; *disponere* there means something different from *dare*. Marriage is the period at which a power of disposing of property is most requisite. Portions are always made payable at marriage.

In some respects marriage is an actual disposition. By the marriage contract, the daughter communicated to her

husband a right to an estate for life as tenant by the curtesy. If the words "of an age to dispose," be considered as meaning the age of twenty-one, with reference to the real estate the devise over to the sisters will be defeated; because, as the daughter clearly attained a sufficient age to dispose of the personal estate, the whole of the 6,000*l.* given to the charity must be paid out of the land, which is barely sufficient for that purpose. This, therefore could not have been the intention of the testatrix.

The title of the sisters indeed depends upon another contingency which has not happened, the daughter's dying unmarried. It may, perhaps be contended, that those words refer only to the daughter's being buried at *Drayton*; but the most rational construction is, that the sisters were to become entitled only in that event.

Mr. Attorney General for the defendants the sisters.

As to the Exchequer Annuities, nothing is given to the children by the marriage articles, except through the appointment of the father. But, supposing the daughter to have been entitled to those annuities under the settlement, the legacy operated as a satisfaction; for the annuities were clearly intended as a portion; and the rule of the court is against a child's having a double portion. As to the argument that the annuities and the legacy were not of the same species; they were both personal estate, and both convertible into money.

The testator did not conceive that his daughter would be entitled to the annuities; for he provided a maintenance for her out of the legacy.

As to the question upon *Mary Billingsley's* will, the obvious meaning of the words "of an age to dispose," is that age at which, by the rules of law, the daughter would be enabled to dispose of the property given to her. They imply some act to be done by the party, and not a disposition by operation of law, as by marriage or forfeiture. Marriage indeed operates only as a disposition of the profits, and not of the property.

In 4 Inst. 78 b. it is said, that our law takes notice of seven different ages for different purposes, of which the last is twenty-one, and is there stated to be the age for disposing of lands, goods and chattels. In *Forth v. Chapman*, the reason for giving a different construction to the same words was, that any other construction would have militated against the

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clear intention of the party. In this case the intention of the party requires that the same rule of construction should be applied to the disposition of the real and personal estate, as the only means by which the necessity of raising the whole of the sum of 6,000*l.* out of the real estate can be avoided. The argument that the testatrix could not have intended to disinherit her granddaughter, does not apply as to the personal estate, because in no case could the granddaughter take away part of it, as the whole would belong to the husband.

Feb. 11, 1737.

LORD CHANCELLOR.—As to the first point, I think it is extremely clear that *Bridget Billingsley* the daughter was well entitled to the Exchequer Annuities under the settlement. If, indeed, the question had rested upon that part of the settlement in which the declaration of the trust is made, there might perhaps have been some doubt whether an appointment by the father was not necessary to give a title to the daughter, although, even in that case, the bequest “in default of such child or children,” which must mean child or children generally, would have tended much to remove the difficulty; but the agreement which is recited in the settlement puts the present case out of all doubt; for it is there said, that the annuities shall be in trust for such child or children as the father should have by his wife. This vests the interest absolutely in the children; and the subsequent words “to be disposed of, &c.” only give the father a power of apportioning the annuities amongst his children as he might think proper; but as there was only one child, there was no room for this power of distribution to operate, and that only child, therefore, was entitled to the whole, as was decided in the case of *Davy v. Hooper*, 2 Vern. 665.

As to the second point, whether the legacy of 10,000*l.* is to be taken to be in satisfaction of those annuities, I am of opinion that it ought not to be so considered; but that the daughter, *Bridget Billingsley*, is entitled to both. There have, indeed, been many cases in which the Court has inclined against double portions, but that has generally been owing to the particular circumstances of the case, as where, by allowing double portions to younger children, the heir would be nearly disinherited; but this is the case of an only child, in which there is no intention expressed by the father, that the legacy should be taken in satisfaction.

It has always been held that a bequest to be considered

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as given by way of satisfaction must be of the same nature, and equally certain as the thing in lieu of which it is given; land cannot be considered as given in satisfaction for money, or money for land. In the present case indeed, the annuities and the legacy are, in one sense, of the same nature, for they are both personal estates; but the annuities were to continue only for a term, which the mother or the daughter might have outlived, and the legacy is given absolutely at a certain age. In that respect therefore, they are different in their nature. The legacy also is given upon a contingency, and might never have become payable; for if the daughter had died before she had attained the age of eighteen, the legacy being given out of a real and personal estate would have lapsed, according to the case of *Yates v. Phettiplace*, 2 Vern. 416. and Prec. in Ch. 140. It would be absurd to construe an uncertain contingent interest as a satisfaction for a certain interest absolutely vested, particularly in the case of an only child.

If the Exchequer Annuities had been given away to others by the will, the daughter could not have taken both; that is, the legacy under the will, and the annuities in contradiction to it; but this point is less material, because my opinion is in favour of the plaintiff upon the question relative to the residue of the personal estate.

The question as to the residue of both the real and personal estate depends upon the same words by which such residue is given over if the daughter should die before she should be of an age to dispose thereof. It appears that this will was made in haste, probably by reason of the testatrix's approaching death. No construction which tends to the disinheriting of the heir, or to depriving the daughter of the personal estate ought to prevail, unless the words are very plain for that purpose. As to the personal estate I am very clear that the contingency has not happened upon which the devise over was to take effect. The words used must be taken *reddendo singula singulis*, as if the testatrix had repeated the contingency twice over; and then the several ages which the law prescribes for the disposal of the different kinds of estate will govern the construction in each, as was done in the case of *Forth v. Chapman*, where the same words creating an estate tail in the real were restrained as to the personal estate. I cannot construe the word "dispose" in the sense which has been contended at the

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bar, as meaning an enjoyment of the fruits of the estate or a disposition by operation of law. At the time of the testatrix's death, the infant was of an age to dispose of the estate in that sense, as by forfeiture for treason, or marriage. Tenancy by the curtesy, indeed, and the other consequences of marriage are not properly dispositions of an estate, but privileges conferred by the law. These modes of disposition would not therefore have been in the contemplation of the testatrix; but the words must be taken in the same sense as in *Thomlinson v. Dighton*, 1 Salk. 239.; and must receive the same construction as if the textatrix had said, "If she should die before she may dispose thereof by reason of her age." Applying this rule then to the personal estate, the daughter lived till she was twenty years old; but she might have acted as executrix and have disposed of her personal estate at seventeen, and according to late decisions might have made her will even at fourteen: I think, therefore, that the daughter's representative is clearly entitled to the residue of the personal estate.

As to the real estate, construing the words by the same rule, the age of twenty-one is the fixed period at which the power of disposition over a real estate can be first exercised. The consequence is, that the contingency upon which the real estate was devised over has happened; and the bequest to the charity must therefore take effect. As to what may remain of the real estate after this bequest to the charity is satisfied, it has been contended, that the devise to the sisters is made to depend upon the contingency of *Bridget's* dying unmarried, which has not happened. It is not unlikely that the textatrix intended that the 6,000*l.* should go to the charity in one event, and the residue to her sisters in another; and I do not see how the sentence can be divided in construction. The words used are doubtful; and an heir at law cannot be disinherited by obscure and doubtful words. I therefore, am of opinion that the residue of the real estate must be considered as a resulting trust for *Bridget*, as heir at law to her mother.

I decreed that the plaintiff's wife living to such age as she might have disposed of the personal estate by will, the event never happened upon which the bequest over was given, and that therefore, the surplus of the personal estate vested in her, and belonged to her husband as her administrator.

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That as to the real estate the dying before the age to dispose of it, the contingency had happened whereon the charge of 6,000*l.* for the charity was to take place, and the charity to be established. But I took the surplus (if any) of the real estate to be given over only in case she died unmarried; and that she having married, that contingency did not take place; and that the plaintiff, her daughter, was entitled to such surplus as her heir. (1)

The next day *Lord Chancellor* cited the case of *Whitmore v. Weld*, 1 Vern. 326 and 347. 2 Vent. 367. 2 Cha. Rep. 363.

William Whitmore, the father, made his will in these words:—*viz.*

“The surplus of my personal estate, my debts, legacies, and funerals, being paid, I give to the Earl of *Craven*, for the use of my only son, *William Whitmore*, and the heirs lawfully descended of his body; and for the use of the issue-male and issue-female descended from the bodies of my sisters *Elizabeth Weld*, *Margaret Kemish* and *Ann Robinson*, in case my only son *William Whitmore* should decease in his minority, without having issue lawfully descended from his body. I nominate and appoint my only son *William Whitmore*, executor of my last will and testament. I nominate and appoint the Earl of *Craven*, during the minority of my son *William*, executor of my said will.”

Testator died, *William Whitmore* the son, being then of the age of thirteen years. The Earl of *Craven* proved the will. The son married and died without issue, being above the age of eighteen years and under twenty-one, not having proved his father's will; but the son had made a will and his wife executrix.

A bill was brought by the son's widow and executrix to have the benefit of the surplus of the father's personal estate. And the question at the hearing was, whether she or the children of the father's sisters who claimed by the devise over were entitled.

The cause was first heard by Lord Keeper *North*, who made a case of it for opinion of the judges of the Common Pleas; but after his death and before any certificate the cause came to be reheard by Lord *Jeffreys*, who was clear

(1) Reg. Lib. B. 1737. fo. 322.

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in his opinion for the executrix of the son, and decreed accordingly. And he held, First, That the words *if the son should decease in his minority*, being applied to personal estate should be understood under the age of seventeen, when the minority as to disposing of personal estate determined, and the rather because the son was made executor, and then the executorship vested in him; and he held, the *minority* in the devise over and the minority to suspend the executorship should be understood in the same sense. Mr. *Vernon* makes him go further and say that the trust was vested in the son, and the remainder over was void. But though that is loosely expressed, it must be understood of the case as the fact had happened; for it cannot be doubted, but the devise over on the contingency of the son's dying without issue in his minority was good in its creation.

Mr. *Vernon* reports Lord *North* (though he made a case) to have said that the question touching the minority was a considerable point.

MARTIN LEAKE Plaintiff; (1)
and
THOMAS BENNETT and HANNAH his
Wife, WIVELL, who married ELIZA-
BETH, Sister to HANNAH, and THO-
MAS NORTON } Defendants.

February 21st, 1737.

1 Atk. 471.
Sir J. L. gives
by a codicil to
his will, to his
niece during
her life, his

SIR JOHN LEAKE, by his will, dated 18 Feb., 1717, bequeathed as follows:—I give to my nieces *Hannah Martin*, and *Elisabeth*, or which shall be living at the time of my house, with the household goods, &c. that shall be found therein at the time of his decease; The word *with* so conjoins the devise of the house and household goods, that the devisee can only have a life estate in both. (2) The word *with* would have the same effect in a grant.

(1) The statement of this case, and judgment from *Atkyns*.
the arguments of counsel, are taken from
Lord *Hardwicke's* Note-book. The

(2) See *Richards v. Baker*, 2 Atk. 321.

death, all my plate, household goods, &c. which shall be in my house at *Maze Hill*, at the time of my decease.

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By a codicil, dated 1st of August, 1719, he bequeathed as follows:—I give to *Hannah Martin* 100*l.* *per ann.* for life, over and above what I have given her by my will. I also give to the said *Hannah*, during the term of her natural life, the house at *Maze Hill*, with all the household goods, plate, and furniture, and all the goods that shall be found therein at the time of my decease, except my wearing apparel.

Both the nieces were living at the time of the testator's death, but *Elizabeth* afterwards died.

The bill was for an account of the furniture and goods, and to settle the rights of the parties.

The question was, whether *Hannah Bennett* was entitled to the furniture and goods absolutely, or for her life only.

Mr. *Fuzakerley*, Mr. *Hamilton*, and Mr. *Bicknell*, for the plaintiff.

The house is clearly given for life only, and whatever is given under a *und cum* or *simul cum*, is understood to be given for the same interest as the principal matter. It would be so if a grant were made of certain lands, with all and singular other lands, commons, &c.

In 1 Rol. Abr. 844. l. n. pl. 2., it is said, that if a man devise *Blackacre* to one in tail, and also *Whiteacre*, the devisee shall have an estate tail in *Whiteacre* likewise, because it is all one sentence. In *Cole v. Rawlinson*, 1 Salk. 234., the same effect was given to the word *also*, which is now contended for. If it had been intended that as large an interest should pass by the codicil, as had been given by the will, there would have been no necessity for mentioning the goods in that way. If then an interest for life only is given by the codicil, the greater interest given by the will is thereby revoked, *Coke v. Bullock*, Cro. Jac. 49.

Mr. *Chute*, for the defendant *Wivell*, who had married the other niece, *Elizabeth*, contended that by the will, *Elizabeth* and *Hannah* were tenants in common, and that the representative of *Elizabeth*, was therefore entitled to one half of the goods, subject to the life estate of *Hannah*, given by the codicil.

Mr. *Browne* and Mr. *Clarke*, for the defendants *Bennett* and *Hannah*, his wife, contended that the two nieces by the will, would have been entitled as jointenants, and that the codicil must either be construed to give an absolute interest

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in the goods to *Hannah*, or if the words in the codicil should be held to give only an estate for life, then the bequest by the will must stand good, so far as it is not altered by the codicil. That as the testator's son died between the date of the will and that of the codicil, it would be strange to suppose that the testator intended to give to his niece a less beneficial interest in the goods at the time when he was increasing his bequests to her in respect to the additional 100*l. per ann.* and the house.

Feb. 21, 1737. LORD CHANCELLOR.—The question is, whether this be an absolute devise to *Hannah*, or for life only.

The first consideration is, what she would have taken under the will.

It is plain the nieces would have taken as joint-tenants, and only the particular goods so bequeathed, for the goods excepted they could not, though in the house at *Greenwich*; and the survivor would have taken the whole.

The codicil has made a total alteration in two respects; instead of a joint interest, it is made a sole interest, instead of an absolute property, an interest for life; and *Hannah* likewise takes the goods excepted, and consequently it is a revocation of the will, and an entire new bequest. If the codicil had stood alone, it would have been plainly a gift of the goods for life only; and the word *with* being made use of, it so conjoins the devise of the house, and household goods, that the devisee can have no larger interest in the household goods, than was expressly limited as to the house. If the words "during her natural life" had been subjoined to the devise of the house, it had not been so clear a case, though I think that would not have varied the law of the case neither; but those words being put before the devise, must operate equally on both parts of the subsequent devise, and the same interest pass in both. The word *with* would have had the same effect, and been construed in the same manner in the case of a grant.

His Lordship took notice of a case in 1 Rol. Abr. 844. letter M. No. 2. If a man devise *Blackacre* to one in tail, and also *Whiteacre*, the devisee shall have an estate tail in *Whiteacre* likewise, for this is all one sentence, and consequently the words that make the limitation of the estate go to both, Trinity, 40 Eliz. B. R. He cited too the case of *Cole v. Rawlinson*, Salk. 234., where the word *also* had the like effect, and the same construction put upon it.

Mr. *Fazakerley*, on behalf of the plaintiff, insisted upon

the defendant's giving security for the goods, as the Court had determined she had only an interest for life.

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A tenant for life of goods is not obliged to give security for the goods, but to sign an inventory only to the person in remainder. (1)

LORD CHANCELLOR said he never knew it done, and therefore would not oblige the defendant to do it in this case, but directed an inventory to be made by the defendant *Bennett*, and signed by him and his wife, and to be delivered to the plaintiff.

to the person in remainder. (1)

(1) So *Bill v. Kinaston*, 2 Atk. 82. *Foley v. Burnell*, 1 Bro. C. C. 279.

SAMUEL NEWSTEAD, JOHN STOKES,
and SUSSANNAH his Wife, JOSEPH
ATKINSON and ELIZABETH his
Wife, and SAMUEL NEWSTEAD the
Elder, a Bond Creditor } Plaintiffs; (1)
and

SAMUEL SEARLE, THOMAS MILLER,
a Mortgagee, JAMES BALLS, and Others } Defendants.

March 2nd, 1737.

*Notwithstanding the Settlement on
Children of husband. See in 2d
Comment on this by Ch. B. 32.*

ELIZABETH MARTIN was entitled, under the will of her father, *John Cornwallis*, dated in 1798, to certain freehold, copyhold, and leasehold estates, of the annual value of 150*l*. after the death of her mother, *Grace Cornwallis*; and by her first husband had issue *Elizabeth*, the mother of the plaintiff, *Samuel Newstead*, and the plaintiff *Susannah Stokes*, the mother of the other plaintiff, *Elizabeth Atkinson*.

1 Atk. 265.

A widow who had two children by a former husband, and these two children, each of them a child, and being entitled after the death of her

mother, to certain freehold, copyhold, and leasehold estates, by articles before her second marriage, to which her husband was a party, and with his consent, covenanted that trustees should stand seized of the freehold, copyhold, and leasehold estates, if no issue of the marriage, in moieties; one to the plaintiff, her grandson, his heirs and assigns, the other to her grand-daughter in fee; provided, if there should be any child or children of the marriage, such child or children, to have an equal share of the said estates with the grandson and grand-daughter; The husband and wife afterwards mortgage the estates to persons who had notice of the articles; Declared that the articles are no voluntary agreement, but a binding one, and that it was not fraudulent and void against subsequent purchasers or creditors. (2)

(1) The statement of this case is taken from the Register's Book, the arguments of counsel from Lord *Hardwicke's* Note-book, and the judgment from *Atkyns*.

(2) But marriage articles will not be carried into execution against purchasers for valuable consideration, and without notice; see *Warwick v. Warwick*, 3 Atk. 292. *West v. Errissey*,

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After the death of her first husband, *Elizabeth Martin* married the defendant *Samuel Searle*, and by indenture, by way of settlement, made previous to that marriage, and dated the 30th of April, 1709, reciting the will of *John Cornwallis*, and that it had been agreed that *Elizabeth Martin* should dispose and settle her estate to the uses and purposes thereafter mentioned; the said *Elizabeth Martin*, with the consent of the said *Samuel*, for the settlement of her estate upon such children and grandchildren of her the said *Elizabeth*, as she should have living, either by her late husband, *John Martin*, or by *Samuel Searle*, at the time of her death, covenanted that the trustees should, after the death of *Grace*, stand seised of the premises to the uses thereafter mentioned; that is to say, To apply the rents, during the coverture, in manner therein mentioned, whereby power was reserved to *Elizabeth* to charge the estates with 200*l.* to be paid after her decease, as she should appoint, and for want of such appointment, to be paid to her husband; and after the deaths of *Grace* and *Elizabeth*, if there should be no issue of the marriage between *Samuel Searle* and *Elizabeth*, living at her decease, to convey one moiety of the premises to the plaintiff, *Samuel Newstead*, his heirs and assigns, and the other moiety to the plaintiff, *Susannah Stokes*, for life; and after her decease, to her said granddaughter, the plaintiff, *Elizabeth Atkinson*, in fee, provided that if there should be any children of the marriage between

2 P. Wms. 355. *Powell v. Price*, ib. 539. *Hart v. Middlehurst*, 3 Atk. 376. and see Mr. *Fearne's* remarks upon these cases in *Fearne's* Contingent Remainders, p. 73. Nor will they be carried into execution in favour of collateral relations against judgment creditors, *Finch and Others v. Earl of Winchelsea*, 1 P. Wms. 277., though they will be supported between relations in a family, per Lord *Hardwicke* in *Goring v. Nash*, 3 Atk. 188., and see *Vernon v. Vernon*, 2 P. Wms. 600. or between parties to the articles and their representatives, and mere volunteers, *West v. Errissey*, 2 P. Wms. 349. and see *Warwick v. Warwick*, 3 Atk. 293. *Kittleby v. Atwood*, 1 Vern. 298, 471. *Lancy v. Fairchild*, 2 Vern. 101. *Stephens v. Trueman*, 1 Ves. 73. *Hart v. Middlehurst*, 3 Atk. 372. *Barstow v. Kilvington*, 5 Ves. 593. *Sutton*

v. *Chetwynd*, 3 Mer. 249.; and though it has been formerly held that in settlements the consideration of marriage would not only make good against creditors and purchasers the limitations for the husband, wife, and children, but would also make good all the limitations contained in the settlement, though they were not the immediate objects of the settlement, see *Osgood v. Strode*, 2 P. Wms. 252. *Jenkins v. Keymish*, 1 Lev. 150, 237. 1 Ch. Rep. 275. *Hamerton v. Milton*, 2 Wils. 356.; yet by modern determinations, against purchasers, even with notice, limitations to the brothers of the settlor, who were not the immediate objects of the settlement, have been held void, *Johnson v. Legard*, 3 Mad. 289. 6 Maul. & Sel. 60., and see *Cormick v. Shepherd*, 6 Dow. 60.

Samuel Searle and *Elizabeth*, such children should share equally with the children of the first marriage.

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The marriage took effect, and after the death of *Grace* in 1719, the husband, *Samuel Searle*, entered upon the premises, and received the profits, and continued so to do notwithstanding the death of his wife, *Elizabeth*, in Nov. 1733, without leaving any issue by him.

By indenture of 15th of May, 1710, between *Searle* and *Elizabeth*, his wife, of the first part, and *Coleman* and others trustees, of the second part, reciting the will of *John Cornwallis*, and the articles of 30 April, 1709, and that *Elizabeth*, previous to her marriage with *Searle*, was indebted by a bond to *John Stokes*, in order to indemnify *Searle* against that bond, it was covenanted that *Searle* and *Elizabeth*, his wife, should levy a fine to the use of *Coleman*, &c. for 500 years, in trust to raise 200*l.* The leasehold estates were also assigned to *Coleman* for the separate use of *Elizabeth*, for her life, and afterwards as she should appoint.

By indenture of 4th of March, 1719, reciting the above deed, and that a fine had been levied accordingly, and that *Searle* and his wife had occasion to borrow 200*l.*, in consideration of 200*l.* paid to defendant *Searle*, *Coleman*, &c. with the consent of *Searle* and his wife, convey the freehold premises to *Thomas Pinder* to hold for the residue of the term of 500 years, redeemable on payment of 200*l.* and interest by *Searle* the husband, and his heir; and as a further security by the same indenture, assign the leasehold premises to *Thomas Pinder*. This mortgage through divers mesne assignments, had become vested in the defendant *Miller*, who having advanced divers other sums to *Searle* and his wife, claimed 1,310*l.* as due upon that security, and insisted that he had no notice of the claim of the plaintiffs.

It was admitted, that all the subsequent deeds by which he claimed, were founded on that of 4th March, 1719, and that he must, therefore, be affected by any notice which that deed conveyed.

The object of the bill was to obtain payment of the bond debt out of the estate, and that the other plaintiffs might have a conveyance and assignment of the estates upon the foot of the articles of 30th April, 1709, and to set aside incumbrances upon the estates made in prejudice of the articles, and to have satisfaction for breaches of the covenants in the articles, and for accounts of rents since the death of *Elizabeth Searle*.

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Mr. *Attorney-General*, for the plaintiffs, contended that as to the mortgagees, there was clear evidence of notice that *Pinder*, the original mortgagee, took his conveyance from the trustees, and not from the husband and wife; that the plaintiffs were not mere volunteers, for that every reciprocal stipulation previous to marriage, imports a consideration. In this case the husband would have been tenant by the curtesy of the freehold, and would have had an absolute power to dispose of the leasehold. In *Osgood v. Strode*, 2 P. Wms. 245., the question was, as to a remote relation claiming after a previous estate tail. Here the plaintiffs were the primary objects of the settlement; they were to be preferred, or at least, to take equally with the children of the second marriage. In *Lechmere v. Lechmere*, Ca. temp. Talb. 80., and 3 P. Wms. 211., the covenants of a marriage settlement were enforced for the benefit of an heir at law, although he was not one of the immediate objects of its provisions.

Mr. *Attorney-General*, and Mr. *Browne*, for the defendant *Miller*, the mortgagee, contended that the plaintiffs were mere volunteers, that no consideration moved from them. That it was the same thing as if the agreement had been made upon any other occasion. That the question was not, whether these articles were fraudulent as against purchasers, but whether the Court would assist the plaintiffs, who were mere volunteers, to carry them into execution. That in *Parry v. Hughes*, 2 Eq. Ca. Abr. 54., the Court refused its aid, one claiming under similar circumstances. In *Osgood v. Strode*, 2 P. Wms. 255., Lord *Macclesfield* said, that the husband and the wife, and the issue, were the only parties who could be presumed to be stipulated for in marriage articles, and that in *Vernon v. Vernon*, 2 P. Wms. 595., the plaintiffs had a sort of claim which the settlement might have been intended to satisfy. That if plaintiffs were to be considered as mere volunteers, the question of notice was immaterial, but if not, that no sufficient evidence of notice had been given.

Mr. *Green*, for the defendant *Searle*, contended that he was entitled to the equity of redemption.

LORD CHANCELLOR.—The question is, whether the articles of the 30th of April, 1709, are for a valuable consideration, and binding, or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors or purchasers.

If I was to lay it down as a rule, that such articles as these are not binding, it would become impossible for a widow, on her second marriage, to make any certain provision for the issue of a former, and the second husband might then contrive to defeat the provision made for those children. (1)

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I am of opinion these articles ought not to be considered as a voluntary agreement, and that the plaintiffs are entitled to relief in this Court. This is the case of a widow, who has two children by a former husband, and no provision made for them, and those two children have each of them a child, and the mother being in possession in her own right of freehold estate, leasehold, and copyhold, the second husband, if there had been a child born alive, would have been entitled to be tenant by the curtesy of the freehold, and also to the leasehold and copyhold immediately upon the marriage.

To prevent this, by the articles before the second marriage, 200*l.* is allowed to be raised by the wife out of the estate, and in case there should be no children of the second marriage, then one moiety thereof was to go to the plaintiff *Newstead*, his heirs and assigns, and the other to *Susanna Stokes* for life, remainder to *Elizabeth Atkinson*, her heirs and assigns, the former her grandson by the first marriage, and the latter her daughter and granddaughter; but if there should be any child or children of the second marriage, then they were to have an equal share with the plaintiffs.

Upon the mortgage to *Pinder*, by the contrivance of some country attorney, *Elizabeth Searles* and her husband levied a fine; and in the deed to lead the uses there is a complete recital of the will, under which the wife claimed, and of her marriage settlement, in so ample a manner, that the will and settlement must necessarily have been laid before him, and he must consequently have had full notice of it as agent for the mortgagee.

The children of the first marriage stand in the very same plight and condition as the issue would have done, if there had been any of the second marriage, and even are provided for before them.

Supposing there had been issue of the second marriage, and they had brought their bill to carry these articles into

(1) Vide *Cotton v. King*, 2 P. Wms. 358, 674. *Countess of Strathmore v. Bowes*, 2 Bro. C. C. 345. 1 Ves. jun. 22.

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execution, upon a decree in their favour, would not the children of the first marriage have been equally entitled to a benefit from the decree?

Hard. 395.
Ch. Cas. 103.
Ch. Rep. 275.
see Gild. Pract.
302.

Taking the case with all its circumstances, I think the settlement no voluntary agreement, but a binding one; the statute of the 13 & 14 of Eliz. that makes conveyances fraudulent, are voluntary conveyances, made against purchasers for a valuable consideration, or *bona fide* creditors: but it would be difficult to shew that such a limitation, as the present case, has been held fraudulent, and void against subsequent purchasers or creditors. (1) (2)

The present is a stronger case, for here are reciprocal considerations both on the part of the husband and wife, by the provision under the articles for the children of the second marriage.

The mortgagees had notice that the lands were liable to these articles, and therefore the plaintiffs are entitled to have the benefit of them against the defendants who are affected by notice; and his Lordship decreed an account to be taken of what is due for the principal sum of 200*l.* and interest, from the death of *Elizabeth*, the late wife of the defendant *Searle*, deducting what has been received by *Miller* in respect of the rents and profits since the death of *Elizabeth*, and to tax *Miller* his costs, so far as relates to the mortgage of 200*l.*, and upon being paid what shall be reported due,

(1) *Jenkins v. Keymis*, 1 Lev. 150 & 237. There Sir *Nicholas Keymis*, being tenant for life, remainder to his son *Charles* in tail, in 1641, in consideration of a marriage to be had between his son and *Blanch Mansell*, and 2,500*l.* portion, levied a fine to the use of Sir *Nicholas Keymis* for life, remainder to *Charles* and *Blanch* for their lives, remainder to the heirs of the body of *Charles* of *Blanch* begotten, remainder to the heirs of the body of *Charles*, with power for Sir *Nicholas Keymis* to charge the premises with 2,000*l.* Sir *Nicholas* and *Charles*, in 1642, joined in a lease and release to *David Jenkins* and his heirs for 2,000*l.*, on condition of payment of 2,000*l.* with interest some years after, to be void, *Blanch* afterwards dies without issue, *Charles Keymis* marries another wife, by whom he had issue the defendant, and dies; the mortgagee dies, and

his heir brought an ejectment, and adjudged the lease and release was no good execution of the power at common law. He then brought his bill in equity on these grounds: first, that the consideration of the marriage of *Blanch*, and the 2,500*l.* paid with her, did not extend to the defendant, being an issue by the second venter, and so the estate in remainder whereby he claimed was voluntary; (two other grounds not material to this case) but on the first, Lord Keeper *Bridgman* declared that the consideration of 2,500*l.* paid on the first marriage, should extend to the issue by the second venter.

(2) See *Walker v. Burrows*, 1 Atk. 94. Doe ex dem. *Watson v. Routledge*, Cowp. 705. *Otley v. Manning*, 9 East's Rep. 59. *Pulvertoft v. Pulvertoft*, 18 Ves. 84, and see the note at the commencement of this case.

ordered the defendants *Miller* and *Searle* to convey the freehold, and to assign the leasehold; and surrender the copyhold free of all incumbrances. done by them to the plaintiff *Newstead*, *Susanna* the wife of *Stokes*; and *Elizabeth* the wife of *Atkinson*, according to the several estates and interest therein provided and limited to them by the said marriage articles, subject to the charge of 50*l.* and interest, due on bond to the plaintiff, *Samuel Newstead* the elder.(3)

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(3) Reg. Lib. B. 1737. fo. 478.

The MAYOR, &c. of YORK v. PILKINGTON and
Others. (1)

December 17th, 1737, and March 13th, 1737.

THE bill was brought by the plaintiffs, who claimed several rights of fishery on the river *Ouse*, (against the defendants, who were the lords of five several manors, and were alleged to claim several rights, either as lords of the manors, or as occupiers of the adjacent lands,) to be quieted in the enjoyment of their right of several fishery, and for an account of the fish taken by the defendants.

1 Atk. 282.

Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it, against five different lords

of manors, and between whom and the plaintiffs there is no privity, nor any general right on the part of the defendants, may bring a bill to be quieted in the possession, (2) and to have his right established, though he has not established his right at law; and it is no objection upon a demurrer to such bill that the defendants have distinct rights, for upon an issue to try the general right, they may at law take advantage of their several exemptions and distinct rights.

To this bill the defendants demurred.

LORD CHANCELLOR.—Such a bill against so many several trespassers is improper before a trial at law; a bill may be brought against tenants of a lord of a manor for encroach-

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from *Atkyns*, which has been compared and found substantially to agree with a manuscript report of the same case.

(2) So likewise where many more might be concerned than those brought

before the Court, such as bills for duties, *City of London v. Perkins*, 4 Bro. P.C. 157. But where a question to a fishery is only between two lords of manors neither of them can come into the Court till the right is first tried at law per Lord *Hardwicke*, *Tenham v. Herbert*, 2 Atk. 483.

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ments, &c., or by tenants against a lord of a manor as a disturber, to be quieted in the enjoyment of their common; and as in these cases there is one general right to be established against all, it is a proper bill, nor is it necessary all the commoners should be parties; (3) so likewise a bill may be brought by a parson for tithes against parishioners, or by parishioners to establish a modus, for there is a general right and privity between them, and consequently it is proper to institute a suit of this kind. (4)

There is no privity at all in the case, but so many distinct trespasses in this separate fishery; besides, the defendants may claim a right of a different nature, some by prescription, others by particular grants, and an injunction here would not quiet the possession; for other persons not parties to this bill, may likewise claim a right of fishing.

It is more necessary too in this case there should be a trial at law, for it does not clearly appear, whether there is a right even in the plaintiffs, and if it should eventually come out that the Corporation of York are lords of this fishery, then would be the proper time to have an injunction to prevent their being disturbed in their possession. His Lordship did not give any judgment upon the demurrer, but ordered it to be adjourned to a future day, and on the 13th March, 1737, it came on again to be argued.

Mr. *Browne* and Mr. *Fazakerley* in support of the demurrer.

The only case in which bills of this nature are permitted in Courts of Equity is, where there is one general right extending to several persons, as in questions between a lord of a manor and the tenants, or between a parson and his parishioners. In this case the defendants claim distinct rights of fishery, for though the questions as to all relate to the same river; yet different rights may exist in different parts. Each part is like a distinct waste. The plaintiffs claim an ancient prescriptive right in a royal navigable river. The defendants may make the same claim. This bill is attempted to be supported as a bill of peace, and to prevent multiplicity of suits; but as the defendants claim distinct

(3) See *Brown v. Howard*, 1 Eq. Ca. Ab. pl. 4. p. 163. *Rudge v. Hopkins*, 2 Eq. Ca. Ab. 170. pl. 27. *Poore v. Clark*, 2 Atk. 515. *Cockburn v. Thompson*, 16 Ves. 322.

(4) *Rudge v. Hopkins*, 2 Eq. Ab.

pl. 27. p. 170. But a bill of peace will not lie to settle the boundaries of two manors. *Wake v. Conyers*, 1 Eden's Rep. 331; or of two parishes, *Parish of St. Luke's v. Parish of St. Leonard's*, 1 Bro. Ch. Ca. 40.

rights, no issue that can be framed will ascertain or settle the rights of the parties. No determination as to one will bind the others. There is no impediment to the trial of the question at law; and no reason for resorting to this Court.

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Mr. *Attorney-General* and Mr. *Idle*, for the plaintiffs.

The present will be as effectual as a bill of peace as any bill can be in any other case, for an issue never can finally determine the right of all, since the verdict against one is not pleadable against another. The question and issue to be tried in this case is, whether the plaintiffs have a sole and separate right of fishery, not what rights the defendants may have. In questions between lords of manors and the tenants, the general right of the lord is the only thing established. So in cases of tithes the parson claims one general right; but each of the tenants may have a separate ground of exemption. In the case of the *City of London v. Perkins*, 4 Bro. P. C. 157., a decree was made against the defendants and in favour of the claim of the city to a duty for the weighage of cheese, without any trial at law the right having been established in former trials between the city and other parties; and in *Wicker v. Carter*, 1734, a bill was brought by the lord of a manor to establish a right of sixpence for each load of hay brought into the market, and an issue was directed by Lord *Talbot* to try that right, although of that 6d., 2d. was claimed by the scavenger, and 2d. by the housekeeper against whose house the cart stood; and the verdict being in favour of the lord, a decree was made accordingly.

LORD CHANCELLOR.—When this case was first argued, I March 13, 1737. was of opinion to allow the demurrer; but I have now changed my opinion.

Here are two causes of demurrer, one assigned originally and one now at the bar, that this is not a proper bill, as it claims a sole right of fishery against five lords of manors, because they ought to be considered as distinct trespassers, and that there is no general right that can be established against them, nor any privity between the plaintiffs and them.

In this respect it does differ from cases that have been cited of lords and tenants, parsons and parishioners, where there is one general right, and a privity between the parties. But there are cases where bills of peace have been brought, where there has been a general right claimed by the plain-

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I think, therefore, this bill is proper; and the more so because it appears there are no other persons but the defendants who set up any claim against the plaintiffs, and it is no objection that they have separate defences; but the question is, whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants; for notwithstanding the general right is tried and established, the defendants may take advantage of their several exemptions, for distinct rights.

Another cause of demurrer is, that the plaintiffs have not established their title at law; and have therefore brought their bill improperly to be quieted in possession. Now it is a general rule, that a man shall not come into a Court of Equity to establish a legal right, unless he has tried his title at law, if he can; but this is not so general an objection as always to prevail, for there have been variety of cases both ways.

There are two cases reported together in Prec. in Ch. 530, 531. *Bush v. Western*, and the Duke of Dorset v. Serjeant Girdler, (1) in the former it was held, that a man who has been in possession of a water-course sixty years, may bring a bill to be quieted in possession, although he

(1) In *Weller v. Smeaton*, 1 Cox's Cases, 102, and 1 Bro. Ch. Ca. 572. Lord Thurlow says, "In *Welby v. The Duke of Portland*, in the House of Lords, most of the cases had been looked to, and it was found that, in no instance except that of *Bush v. Western*, this Court had ever interposed in a mere question of right between A. and B., they having an im-

mediate opportunity of trying the right at law; and see *Anon.* 1 Vern. 172. *East India Company v. Sandys*, ib. 127. *Paulet v. Ingres*, ib. 308. *East India Company v. Interlopers*, 2 Ch. Ca. 165. *Whitchurch v. Hide*, 2 Atk. 391. *Anon.* 2 Ves. 415. *Dilly v. Doig*, 2 Ves. jun. 486. *Devonsher v. Newnham*, 2 Sch. and Lef. 199.

had not established his right at law; in the latter, that a man who is in possession of a fishery, may bring a bill to examine his witnesses *in perpetuum rei memoriam*, and establish his right, though he has not recovered in affirmance of it at law; otherwise, if he is interrupted and dispossessed, for then he had his remedy at law.

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In the present case demurrer was over-ruled. (2)

(2) Reg. Lib. B. 1737. fo. 180.

TWISS v. MASSEY. (1)

March 13th, 1737.

A FATHER and son join in trade, and have a commission of bankrupt awarded against them jointly; the bill was brought by a plaintiff, suggesting that he was a separate creditor for the sum demanded by the bill; the defendant pleaded his certificate, and that the debt accrued before he became bankrupt.

1 Atk. 67.

A commission of bankrupt is an action and execution in the first instance. Separate creditors may come under a joint commission, and prove their debts.

The question is, how far separate creditors are affected by or can act under a joint commission of bankrupt; and Mr. Browne for the defendant, cited *Ex parte Crowder*, 2 Vern. 706, where separate creditors were allowed to come in under a joint commission; but the joint effects are first to be applied to pay the partnership debts, and then the separate debts; and as to the separate effects, first the separate creditors, and afterwards the partnership creditors are to be paid out of the same; and therefore the plaintiff might have proved his debt under the commission.

Objection, That it was not affirmed in the plea, that the certificate was signed by four-fifths in number and value.

Mr. Attorney General for the plea urged, that such a particular averment was not necessary in this Court, though it might be so at law; for it is to be presumed here till the

(1) This case is taken from *Atkyns*. It does not appear in Lord Hardwicke's Note-book.

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contrary is proved, as the plea sets forth, that the certificate had been allowed by the *Lord Chancellor*.

LORD CHANCELLOR.—As to the objection of its being a joint commission, that is no objection, for it affects joint and separate estates, because it is never taken out but where both are bankrupts; a commission of bankrupt is an action and execution in the first instance. Suppose an action against two partners, and judgment; separate estates are liable to satisfy that judgment; so in case of bankrupts, separate creditors may come in under that commission, as well as joint-creditors.

If a bankrupt has a certificate under a joint commission, it discharges him from all debts, separate as well as joint.

As this Court marshals demands and securities, so joint creditors, as they gave credit to the joint estate, have first their demand on the joint estate, and separate creditors as they gave credit to the separate estate, have first their demand on the separate estate: the joint commission therefore discharges them from all their debts expressly by the Act of Parliament, which does not mention joint or separate debts: (2) but if the bankrupt has since the certificate made a new promise, that deserves a consideration, and entitles the plaintiff to a discovery; and therefore his Lordship ordered, that the plea should stand for an answer. (3)

(2) So *Horsey's* case, 3 P. Wms. 24. *Ex parte Yale*, note A. *ibid.* *Wiakes v. Strahan*, 2 Str. 1157. *Howard v. Poole*, Davies, 431.; and by 6 G. 4. c. 16. s. 62., joint creditors may prove under a separate commission for the purpose of voting in the choice of as-

signees, and of assenting to and dissenting from the certificate; but they are not to receive any dividend until the separate creditors have been paid the full amount of their debts.

(3) Reg. Lib. B. 1737. fo. 188 b.

AFTER HILARY TERM, 1737.

ANONYMOUS. (1)

LORD HARDWICKE said, though a receiver is appointed by this Court, yet that will not alter the possession of the estate in the person who shall be found entitled at the time the receiver was appointed, so as to prevent the Statute of Limitations running on during the right in dispute.

2 Atk. 15.
The Statute of Limitations will run, notwithstanding the appointment of a receiver. See *Sharp v. Carter*, 3 P. Wms. 379.

(1) This case is taken from *Atkyns*. It does not appear in *Lord Hardwicke's Note-book*.

DA COSTA VILLA REAL v. MELLISH. (1)

March 16th, 1737.

CATHERINE DA COSTA VILLA REAL having been appointed guardian of her two children by her husband's will, by a deed of 3rd May 1734, made between her and her father, agreed, that if either of her children should die intestate, one moiety of what she should thereby become entitled to, should go to her father; and further agreed, that she and all other persons who should, in her right, be entitled to the guardianship of the infants, should permit her father to have the care and education of the children.

2 Atk. 14.
A mother being appointed by her husband's will the guardian of her children, by deed agrees to permit her father being of the Jewish religion, to have the care and education of

her children; The mother who had been converted to christianity, and the children, both present petitions that they may be restored to their mother; The petition of the mother is dismissed; but upon the petition of the children, the grandfather is ordered to deliver over the children to the care of their mother.

Mrs. Da Costa, and her father, and her late husband, were of the Jewish religion; but *Mrs. Da Costa* was soon

(1) The whole of this case is taken from *Lord Hardwicke's Note-book*; except what *Mr. Atkyns* has stated Lord *Hardwicke* to have said, which is not to be found in his Lordship's *Note-book*.

DA COSTA afterwards converted to christianity, and married Mr. Melkish; who, thereupon by an indorsement upon the deed of 3rd May, 1734, ratified all the covenants and agreements contained in that indenture, and undertook to fulfil all the covenants therein entered into by his wife.

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The children were accordingly placed under the care of their grandfather; but now two petitions were presented, the one on behalf of the mother, and the other on behalf of the infants, praying that they might be restored to the care of the mother.

Mr. Browne, Mr. Idle, and Mr. Clarke, in support of the petitions, contended, that the guardianship was not assignable, and that the deed was therefore of no effect. That the grandfather was an improper person to have the custody of the persons of the children, because he had an interest in their property in the event of their deaths, and because he still continued of the Jewish religion.

Mr. Attorney General and Mr. Fazakerley, for the grandfather, contended, that there was no ground for setting aside the agreement; that although the guardianship itself was not assignable, yet a guardian might agree who should have the actual care of the children. No one is bound to accept the office of guardian; by this deed, the mother has waived it; and by her second marriage, she is no longer *sui juris*. In *Ex parte Hopkins*, 3 P. Wms. 152, the Court refused to deliver the infants to their father upon his petition. No objection has been made to the grandfather, except that he is a Jew; but the law does not deprive Jews of the guardianship of their children. The act, 1 Anne, c. 30, ascertains the limits of the law in that respect. The father of these children was a Jew, and no doubt intended that his children should be educated in the same religion. The real question is, whether the Court will interpose to give such a guardian to Jewish children as may change their religion.

The Lord Chancellor dismissed the petition of the mother, but upon the petition of the infants he observed, that although it was probable that that petition proceeded from the same hand, yet that was immaterial, it being the duty of the Court, when any application was made on behalf of infants, to do what was best for their interest. That the Court will not take from Jews the education of their own children, but that the question was not, as had been argued, whether the Court would interpose to give such a guardian to Jewish children as might change their religion, but

whether the Court should not take them from out of the hands of a person who had no right to the guardianship, for the purpose of putting them into the custody of a person who has a right, and whose duty it is, both natural and civil to take care of them, and who is of the religion of their country.

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His Lordship ordered that the petition of the defendant, Mrs. *Mellish* be dismissed; and upon the petition of the plaintiffs, the infants, it is ordered that the defendant *Joseph Da Costa*, the grandfather, do forthwith deliver over the plaintiffs, the infants, into the hands of the said defendant, *Catherine Mellish*, who is their mother and guardian. This case appears in the Registrar's book under the name of *Villa Real v. Mellish*.

Mr. *Atkyns*, in his Report of this case, states his Lordship to have laid down the following rules:—

That vying and revying in affidavits is intirely discountenanced in the Court of King's Bench, *à fortiori* in a Court of Equity.

That there may be an application to the Court in the case of a guardianship of children, though there be no cause depending. (2)

That it is clear in point of law a testamentary guardianship is not assignable.

That the children have a natural right to the care of their mother. (3)

(2) So Ex parte *Birchell*, 3 Atk. 813; and see likewise Hargrave's and Butler's Co. Litt. 88 b. note 70. Ex parte *Whitfield*, 2 Atk. 316. Ex parte *Mountfort*, 15 Ves. 448. Ex parte *Myerscough*, 1 J. & W. 151.
(3) See Hargrave's and Butler's Coke Littleton 88 b, note (66).

RIDOUT v. LEWIS. (1)

March 25th, 1738.

1 Atk. 269.
L. had 300*l.*
per annum pin-
 money, the
 husband for
 several years
 before his
 death paid her
 200*l.* only,
 but promised
 her she should
 have the whole at last; Held that she was entitled to the arrears of her pin-money out of the estate upon which it was charged. But if the wife accepts less or lets her husband receive what she has a right to receive to her separate use, it implies a consent in her to such a method, where the husband and wife have cohabited together for any time after. (2)

By the settlement made upon the marriage of Mr. and Mrs. *Lewis*, dated 8th of February, 1709, a term of 500 years in certain estates was vested in trustees upon trust to raise and pay 300*l.* *per annum*, clear of taxes for the separate and personal use of Mrs. *Lewis*, and subject thereto to Mrs. *Lewis* for life.

Mr. *Lewis* being dead, a bill was filed by his creditors and by the legatees and devisees claiming under his will for the due administration of his real and personal estate.

In this cause Mrs. *Lewis* adduced evidence to shew that for twenty years past she had only received 200*l.* *per annum* instead of the 300*l.* secured to her by the settlement; and that in conversations upon that subject her husband had said to her, You have money when you want it, and you will have it all at last.

(1) This case is taken from Lord *Hardwicke's* Note-book, excepting the judgment, which is taken from *Atkyns*.

(2) It seems to be a general rule that if the husband receives from the trustees the separate maintenance of his wife, the Court will not charge him with more than one year's income; upon the notion of the wife's consent to make it a common fund for the expense of the family, per Lord *Eldon*, D. *Brodie v. Barry*, 2 V. & B. 39. *Parkes v. White*, D. per Lord *Eldon*, 11 Ves. 226. *Offley v. Offley*, Prec. Ch. 26. *Aston v. Aston*, 1 Ves. 267. D. per Lord *Hardwicke*, Lord *Townsend v. Windham*, 2 Ves. 7. *Peacock v. Monk*, 2 Ves. 190. *Burdon v. Burdon*, cited in 2 Madd. 286. Though in some cases it has been held, that she shall not have the arrears of her pin-

money even for one year, *Powell v. Hankey*, 2 P. Wms. 83. *Thomas v. Bennet*, ib. 342. *Fowler v. Fowler*, 3 P. Wms. 354. *Squire v. Dean*, 4 Browne's Ch. Ca. 325., and *Dalbiac v. Dalbiac*, 16 Ves. 116. But this rule proceeds upon the presumption of the wife's consent to make it a common fund for the support of herself and family; therefore where part is paid to her and there is a promise to pay the residue of the pin-money as in this case; and see Countess of *Warwick v. Edwards*, 1 Eq. Ab. 140. pl. 7.; or where the wife lives separate from the husband and is not maintained by him, (*Lady Derby's* case, cited in *Aston v. Aston*, 1 Ves. 267.) such presumption is repelled and the wife will be entitled to the whole arrears of her pin-money.

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Mr. *Browne* for Mrs. *Lewis*, therefore, insisted that she was now entitled to be paid an arrear of 100*l. per annum* for twenty years : and cited Countess of *Warwick v. Edwards*, 1 Eq. Ab. 140.

Mr. *Attorney-General*, on the other side, insisted that having for so long a time received only 200*l. per annum*, she must now be presumed to have given up the remaining 100*l. per annum*.

LORD CHANCELLOR.—I allow that it is a general rule, March 25, 1738. when a wife accepts a payment short of what she is entitled to, or lets the husband receive what she has a right to receive to her separate use, it implies a consent in the wife to submit to such a method, where the husband and wife have cohabited together for any time after ; but here is no pretence that the pin-money was departed from by the wife, for there is evidence of several payments *eo nomine* ; and though a wife may come to an agreement with her husband in relation to any thing she is entitled to separately ; yet this does not amount to a new agreement ; for here was a promise she should have it at last, which was an undertaking to pay the arrears ; she is therefore entitled to have the arrears of her pin-money raised by the trustees out of the estate, which was by settlement charged with it.

It appearing that the defendant *Lewis* is entitled to a provision of 300*l. a-year* for her separate use during the life of her husband under her marriage settlement ; and that for several years past there hath been a considerable arrear in the payment thereof, which the testator declared his intention should be made good to her ; It is ordered and decreed that the Master take an account of the arrears of the 300*l. a-year*, and what shall be found due on the balance of that account is to be considered as a charge on the term of 500 years created by the marriage settlement for securing the 300*l. a-year*. (2)

STEPHEN THOMSON and Others, Creditors of JAMES HAMILTON and ROBERT TOLLER, and the said JAMES HAMILTON } Plaintiffs; (1)

and

ALEXANDER NOEL and Another, Trustees of the Marriage Settlement of ROBERT TOLLER and his Wife, and the said ROBERT TOLLER and his Wife } Defendants.

—
April 26th, 1738.

See Eq. Ca.
Ab. 48.
1 Atk. 60.

A. by articles previous to his marriage agrees to vest 1,000*l.* in trustees, the interest thereof to be received by *A.* and his wife, during their lives, and afterwards to be divided between their issue, and gives the trustees a warrant of attorney to confess judgment for that sum, which was entered up accordingly; *A.* enters into partnership with *B.*

afterwards, and being indebted to the partnership estate in more than his interest in that estate, they submit the difference between them to arbitration, and part of the stock in trade is awarded to be deposited in the hands of a third person; any part to be delivered to either of the parties on making it appear any bond or other debt due from the partnership had been paid by either, the quantity to be delivered in proportion to the money paid; The trustees in the marriage articles having taken a moiety of the stock in trade as the property of, or in execution upon the judgment; Upon a bill brought by the partnership creditors to set aside the execution and to have the stock appropriated for the payment of their debts; Held that the plaintiffs being neither parties to the submission or privy to the transaction, were not entitled to the benefit of the award.

(1) The whole of this case is taken from *Atkyns*, except some trifling alterations which have been made in the statement from Lord *Hardwicke's* Note-book.

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mers on producing any bond, &c. which had been entered into on account of the partnership, paid off by the party producing the same; the quantity of wine to be delivered, to be in proportion to the money so paid off.

The forty pipes of wine were accordingly deposited, with the consent of *Hamilton* and *Toller*, in the hands of *Hayward*: afterwards a *scire facias* is brought on the judgment so confessed to the trustees in the marriage articles, and on the 28th of March, 1734, 450*l.* 10*s.* 0*d.* being one moiety of the value of the wine was taken in execution by a *fiery facias* as the property of *Toller*.

The bill is now brought by *Hamilton*, who is likewise a separate creditor of *Toller*, and twelve other creditors, on the account of the partnership, to set aside this execution, and to have 450*l.* 10*s.* the value of the moiety of the forty pipes of wine appropriated to the payment of the debts of these creditors.

Mr. *Faxakerley* for the plaintiffs, taking it for granted the award, with respect to the deposit of the wine, was intended as a provision for the creditors on the partnership account, and, as a security for the payment of their debts, insisted that every award when made was considered, in point of law, as the very act of the parties submitting to the determination of the arbitrators, and as the agreement of the parties themselves; and it is upon that footing an action of debt lies against the party on the award, for when a submission is made a rule of Court, an attachment lies for non-performance of the award, as a breach of his own agreement, which by rule of Court he had engaged to perform; and that this case, therefore, must be considered in the same light, as if the parties themselves in the first instance had, without the intervention of any arbitrators, agreed to make a deposit of these pipes of wine for the purpose mentioned in the award; that in such case the creditors, though there might be no alteration in the property made thereby, would have an equitable lien on these wines specifically in satisfaction of their debts, and as such, would prevail against any execution afterwards at the suit of any other person; that the judgment creditors here, the trustees, merely as such, had no interest in these wines, but that right must arise, if at all, from the *fiery facias*, which could not take place here, as there was a prior equitable lien upon them; that, indeed, where goods are specifically bound in equity, and a purchaser, without notice, &c. afterwards gains a legal right in

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them, having advanced his money at the time upon the credit of those very goods, as such purchaser has an equal equitable lien, and the law too on his side, his right will prevail; but it is otherwise where the creditor, at the time his demand first accrued, relied only on the personal security and general credit of his debtor; there any legal right which he obtains afterward in any of the effects of his debtor, must be subject to every such trust or equitable lien which they are liable to in the hands of the debtor himself, and such creditor can only stand in the place of his debtor, as in the case of bankruptcy, the assignees, &c., though perhaps equally creditors with any others, (who have before obtained an equitable lien on any of the bankrupt's effects specifically,) and have the law on their side too, the property of the bankrupt's effects being vested in the assignees, yet they must only stand in the place of the bankrupt, and take his effects subject to all those equitable charges which they were liable to in the hands of the bankrupt. *Vide Taylor v. Wheeler*, 2 Salk. 449. and *Burgh v. Francis*, 1 Eq. Ca. Ab. 320. :

Mr. Noel *contra*, insisted that the creditors had no right to bring a bill to have this award carried into execution, not being parties to the submission, nor concerned therein, it being a matter altogether transacted between *Toller* and *Hamilton* only; and, therefore, as the creditors would not at all be concluded by this award, but at liberty still to pursue their remedy as they thought proper, for the recovery of their debts, there was no reason why they should have any benefit from this award, because it happened to be in their favour; he relied likewise on the want of sufficient evidence on the part of the plaintiffs, to prove the acquiescence of *Toller* in the award, or even his knowledge what the award was; and, indeed, the only evidence to that purpose was his applying to the arbitrators before the award was finally made, to let him have part of the wine to carry on his trade with, (which the arbitrators would not comply with,) and his agreement afterwards with *Hamilton* to have the wines deposited in the hands of *Hayward*, but no evidence that he was present when the award was made, nor any other evidence that he was informed of the contents of it.

April 26, 1738.

A bill will not lie to carry an award into execution

where the parties to the submission do not acquiesce in it, nor agree afterwards to have it executed, but must be enforced at law.

LORD CHANCELLOR.—A bill to carry an award into execution when there is no acquiescence in it by the parties to the submission, or agreement by them afterwards to have it

executed, would certainly not lie;(1) but the remedy to enforce performance of the award must be taken at law. It has been said, the evidence here of *Toller's* agreement to the award after it was made, was not sufficient to found a decree on; but what he principally relied on was, that none of the plaintiffs, the creditors, were parties to the submission, nor did it appear that they were so much as privy at all to the transaction; and, therefore, as they were under no obligation of abiding by the award, they ought not to have the benefit of it; and in reading over the award, (which at the time of making it was taken down in writing,) he observed it was calculated only for the indemnity of *Hamilton* against the failure of *Toller*, without any regard had at all to the creditors, there being no provision made, that the wines should be sold, or otherwise employed for raising money for the payment of debts of the plaintiffs. That though an agreement made between the two partners, and particular creditors, to appropriate a particular part of the partnership effects for the payment of those creditors, might create a lien on those goods specifically for the payment of their debts, in preference to the rest of the creditors; yet an agreement of that kind between the partners only, would certainly not disable any of the creditors from pursuing their remedy at law against the effects of the debtor, any more than if no such agreement had been made.

The bill dismissed.

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(1) So *Bishop v. Webster*, 1 Eq. Ab. 51, but it is now held that a bill will lie for the specific performance of an award; because the award supposes an agreement between the parties, and con-

tains no more than the terms of that agreement ascertained by a third person, per Lord *Eldon*, *Wood v. Griffith*, 1 Swanst. Rep. 54, and see *Norton v. Mascall*, 2 Vern. 24.

JOHN WYLD, Brother and Heir at Law }
of RICHARD WYLD } Plaintiff; (1)
and
THOMAS LEWIS, and ELIZABETH his }
Wife, Widow of RICHARD WYLD . } Defendants.

April 26th, 1738.

1 Atk. 432.
R. W., by his will, gives to his wife *Elizabeth*, all his lands not settled in jointure. And if it shall happen that his wife has no son or daughter by him, and for want of such issue, then the said premises to return to his brother, if he shall be living, and his heirs for ever, paying to *A.* and *B.* 150*l.* within one year after her decease. Held an estate tail in *Elizabeth*, and that the subsequent words do not controul the legal operation of the precedent words creating an estate tail.

RICHARD WYLD, by his will, dated the 15th of April, 1718, devised as follows:—"I give to my wife *Elizabeth*, all my lands, &c. not settled in her jointure. And if it shall happen that my said wife *Elizabeth*, shall have no son nor daughter, by me begotten on the body of the said *Elizabeth*, and for want of such issue, then the said premises to return to my brother *John Wyld*, if he lives so long, and his heirs for ever, only paying to his brothers (*A.* and *B.*) the sum of 150*l.* within one year after the decease of the said *Elizabeth*."

Elizabeth had a daughter born after the death of the testator, and since dead. The bill was now brought by *John Wyld*, the brother of the testator, and who is likewise his heir at law, to restrain the defendants from committing waste, and for an account of timber felled; and the question was, what estate *Elizabeth* took by the will, whether in tail, or for life only.

Mr. *Browne*, for the plaintiff, insisted she took for life only; that the words in the will "if she had no son or daughter" would certainly not raise an estate tail by implication, and the subsequent words "for want of such issue" will not enlarge the estate, the word "such" restraining the word "issue" to mean only such son or daughter; that the word "issue" received such a restrained construction for the same reason, in the case of *Popham v. Bamfield*, 1 Salk. 236., for there the devise was to *A.* for life, remainder to the first

(1) The whole of this case is taken from *Atkyns*, which has been compared with, and is found substantially to agree with another manuscript report of the same case.

son of *A.*, in tail male, and so on to the tenth son, and if *A.* die without issue male, remainder over; it was insisted *A.* had an estate tail; but the Court held otherwise, and construed the words, "dying without issue male," a dying without such issue male.

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That it was the intent of the testator, that *Elizabeth* should take for life only, appears farther from the limitation in the will to *John*, if he should be then living; so likewise from the direction for paying the money within a year, and to the two brothers, particularly naming them, which provisions seem to imply plainly an intention in the testator, that the estate of *John* should commence, if at all, on the death of *Elizabeth*, and was not intended to wait till an estate tail should be spent. That the limitation here to *John* was merely contingent, and such contingency never happening, because *Elizabeth* had a daughter, the plaintiff *John* does not claim under this devise, but as heir at law to the testator, is entitled to the reversion in fee expectant on the estate for life, limited to the wife under the will.

Mr. *Fazakerley*, *contra*, to prove this an estate tail, cited *Newton v. Barnardine*, Moore 127, and *Byfield's case*, Hil. 42 & 43 Eliz. cited by *Hale*, Chief Justice, in *King v. Melling*, 1 Ventr. 231., there the devise was to *A.*, and if he dies, not having a son, then to remain to the heirs of the testator. "Son" was there taken to be used as *nomen collectivum*, and held an entail. He likewise cited 2 Vern. 766. *Pinbury v. Elkin*, it is said there, if he die, not having a son, that these words create an estate tail. To enforce this construction, Mr. *Fazakerley* insisted on the absurdity which would otherwise follow, that supposing *Elizabeth* not tenant in tail, but for life only, with a contingent limitation to any son or daughter of her's, if such son or daughter should die in the lifetime of the mother, though leaving issue, such issue could never take within the words of the will, which can never be presumed to be the intent of the testator.

Mr. *Wilbraham* on the same side, said in the case of *Poplum v. Bamfield*, the foundation the Court went on in construing that an estate for life only was the express devise for life to the first devisee, for the words are, "there is a mighty difference between a devise to *A.*, and if he die without issue, to *B.*, and a devise to *A.* for life, and if he die without issue, then to *B.*"

Mr. *Brown*, in reply said, if the testator by his will had made a certain and absolute disposition of the whole fee, the

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objection that the grandchildren would by this construction be excluded, would be strong against us, but here a contingent disposition only, is made of the inheritance to *John*, which contingency has not taken effect, and the estate descends as was intended by the testator, if such contingency should not happen, so that no exclusion of the grandchildren could possibly be.

April 26, 1738.

LORD CHANCELLOR.—It seems clear from the words of the will, “as to all my worldly estate,” which introduce the disposing part of the will, that the testator intended to make an absolute disposition of his whole estate by his will, and not suffer any part to descend as undisposed of, in case of any contingency; and as he intended a disposition of the whole by his will, the objection that the grandchildren by this construction are liable to be excluded, is a very strong argument for construing this an estate tail, and the inclination to avoid this absurdity has been the principal reason for construing words of the singular number, and which are properly descriptive of particular persons only, in a collective sense, as including the descendants of the first taker, and was the governing reason, in the cases of *Dubber v. Trollop*, in B. R., and* *Shaw and Weigh*, 28th of April, 1729, in Dom. Proc. Eq. Ca. Ab. 185. pl. 28. *Byfield’s* case, cited in Vent. 231., is full as strong as the present, here is no difference in the construction of the devise of a real estate, between a provision, that if devisee dies, not having a son, as it is there, or if the devisee has not a son as here.

* 3 Danv. Abr. 178. pl. 26. Fortescue’s Reports, 58. 2 Stra. 798. Fitzgib. 7. 8 Mod. 253, 382. Barnard. B. R. 54.

In *Popham v. Bamfield*, an express estate for life is limited to the devisee, which has always had a great influence in the construction of a will, when the question has been, whether tenant for life or in tail.

If *Elizabeth* has no son nor daughter, must be understood have no issue; and the words, for want of such issue, amount to the same as if he had said, for want of such issue generally.

Great stress has been laid by the plaintiff’s counsel upon the word such, as if it restrained the word issue to mean only such son or daughter, and that the precedent words, “if *Elizabeth* has no son nor daughter,” will not raise an estate tail by implication; but in *Wild’s* case, 6 Co. 16 b. it was resolved, “that if *A.* deviseth his lands to *B.* and his children or issue, and he hath not any issue at the time of the devise, that the same is an estate tail, for the intent of the devisor is manifest and certain, that his children or issue should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; and, therefore, there such words

“ shall be taken as words of limitation, viz. as much as children or issue of his body.” And I am of opinion here the words son nor daughter must be taken in the same sense as having no issue, and then the word such will have no weight, but will amount to the same thing as if he had said, for want of issue, and the words, having no issue, or dying without issue, have always been considered in the same light, both in law and equity.

The direction for the payment of the 150*l.* within a year, is a very proper circumstance in general to be made use of, to induce the construction contended for by the plaintiff, and what may seem to imply an intent in the testator, that the interest of *John Wyld* under the will should, if at all, commence on the death of *Elizabeth*, but if the preceding words are proper to create an estate tail, the legal operation of them cannot be controuled by those subsequent provisions. The bill must therefore be dismissed.

The *Lord Chancellor* to his note of this case has added the following memorandum:—

I am of opinion, that on the construction of this will, the wife took an estate tail, for that otherwise the testator's grandchildren would be disinherited; and therefore dismissed the bill.

WYLD
v.
LEWIS.

GEORGE PROWSE, Administrator of }
 THOMAS PROWSE } Plaintiff; (1)
 and
 GEORGE ABINGDON and WYNDHAM }
 HARBIN, Trustees of the Real Estate, }
 RUPERT FLOYER, and ANN his Wife, } Defendants.
 and CHARLES ABINGDON . . . }

April 28th, 1738.

1 Atk. 482.
Where a testator devises all his lands to

THOMAS COMPTON, by his will dated 13 August, 1718, devised all his lands to *John Clement* and *John Prowse*, and trustees upon trust, to sell a certain specified part, and with the money arising from the sale to pay debts, and as to the residue to receive the rents and profits, and by granting leases for three lives, or ninety-nine years, determinable on three lives, to pay all his debts and legacies, and subject thereto, he devises the same to *J. A.* in tail-male, and gives to his nephew 500*l.*, to be paid at twenty-one or marriage, and makes his trustees executors; the nephew having died before twenty-one, and unmarried, and the personal estate, and the money arising from the sale of the estate devised to be sold, being insufficient for the payment of debts; held, that the 500*l.* legacy could not be raised, (2) and that the Court would not marshal the assets by throwing the debts upon the real estate, for the purpose of paying the legacy out of the personal estate, (3) the legatee having died before the time of payment.

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book; the judgment from a manuscript report, which is found in substance to agree with Mr. *Atkyns's* report, and with another manuscript report of the same case.

(2) There is a difference between legacies charged upon land, and those payable out of personal estate; with regard to the latter, the Court of Chancery adopts the rules of the civil law, in conformity with the Ecclesiastical Court. Thus, where there is a present gift of a legacy out of personal estate, to be paid at a future time, the legacy vests immediately, *Cloberry's* case, 2 Vent. 342. *Duke of Chandos v. Lord Talbot*, 2 P. Wms. 613, and the cases cited by Mr. *Cox* in note 1 to that case. *Crickett v. Dolby*, 3 Ves. 13. So where interest is given before the time of payment, *Fonereau v. Fonereau*, 3 Atk. 645. *Hoath v. Houth*, 2 Bro. Ch. Ca. 4.

Walcott v. Hall and Others, 2 Bro. Ch. Ca. 305. *Hanson v. Graham*, 6 Ves. 249.

But it seems that these rules of the civil law are not applicable to the construction of deeds or articles, or trusts, though relating to a personal fund, but only to those cases where the legatee could compel payment of his legacy in the Ecclesiastical Court, see this case, p. 317. *Hubert v. Parsons*, 2 Ves. 262. *Lord Teynham v. Webb*, 2 Ves. 207. *Jennings v. Looks*, 2 P. Wms. 276, and see *Van v. Clarke*, 2 Atk. 510. Nor are they applicable to interests arising out of land, for if a sum of money be charged upon land, payable at a future time, and the party dies before the time of payment, the charge sinks into the land. Nor is there any difference whether the charge is created by deed or will, or whether intended as a portion for a child, or as a legacy to a stranger, per Lord *Hardwicke* in this case; or whether interest is or is not

their heirs for ever, in trust, that they should with all convenient speed sell the lands in *Mendford* and *Pinard*, and with the money arising from such sale pay his debts as far as the same would extend, and as to the residue of his lands, that they should receive the rents and profits thereof and thereby, and by granting leases for three lives, or ninety-nine years, determinable upon three lives, to pay and discharge all his debts and legacies, and subject thereto, that they should stand seised thereof, in trust for his sister *Isabella*, the wife of *Charles Abingdon*, for life, and to the heirs male of her body, remainder over in fee; and by the

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given; or whether the land be the primary or auxiliary fund; or whether the person upon whose estate the charge is made be *heres natus* or *heres factus*, *Bond v. Brown*, 2 Ch. Ca. 165. *Lady Poulet v. Lord Poulet*, 1 Vern. 204 and 321. *Smith v. Smith*, 2 Vern. 92. *Yates v. Phelliplace*, 2 Vern. 416. *Carter v. Bletsoe*, Pre. Ch. 267. *Tournay v. Tournay*, Pre. Ch. 290. *Stapleton v. Cheales*, Pre. Ch. 318. *Jennings v. Looks*, 2 P. Wms. 276. *Bateman v. Roach*, 3 Mod. 106. *Duke of Chandos v. Talbot*, 2 P. Wms. 601. *Gordon v. Raynes*, 3 P. Wms. 134. *Bradley v. Powell*, Cas. Temp. Talb. 193. *Hall v. Terry*, *Boycott v. Cotton*, post. *Attorney-General v. Milner*, 3 Atk. 112. *Gawler v. Standerwicke*, note to 1 Bro. C. C. 106. *Pearce v. Loman*, 3 Ves. 135; or whether it is charged upon land directed to be purchased with personal estate, *Harrison v. Naylor*, 2 Cox's Cases, 247. [*Cave v. Cave*, 2 Vern. 508, is stated by Lord Hardwicke to be overturned, and not to have determined the point there mentioned, and, *Jackson v. Farrand*, 2 Vern. 424, to be an anomalous case, see *Boycott v. Cotton*, post;] unless the time of payment has been postponed for the convenience of the estate, d. per Lord Hardwicke in *Lawther v. Condon*, 2 Atk. 133. *Butler v. Duncomb*, 1 P. Wms. 457. *Pitfield's case*, 2 P. Wms. 512. *King v. Withers*, Ca. Temp. Talb. 117. *Shermans v. Collins*, 3 Atk. 319. *Hutchins v. Foy*, Comyn. Rep. 716. *Hodgson v. Rawson*, 1 Ves. 44. *Godwin v. Munday*, 1 Bro. C. C. 190. *Dawson v. Killeb*, 1

Bro. C. C. 119; or unless the testator has expressed an intention that the legacies should vest before the time of payment, *Walkins v. Cheek*, 2 J. & P. 199.

Where portions are given out of land, and no time appointed for the payment, the right to the portion vests immediately, *Lord Rivers v. Lord Derby*, 2 Vern. 72. *Cowper v. Scott*, 3 P. Wms. 119. *Wilson v. Spencer*, ib. 172. But there are exceptions to this rule in respect of portions; as where a child dying at five years old, the Court decreed it not to be raised, because the child died so young, that the end for which it was given ceased, per Lord Hardwicke, in *Lowther v. Condon*, 2 Atk. 133.; and see *Bruen v. Bruen*, 2 Vern. 439. *Warr v. Warr*, Pre. Ch. 213. *Lord Hinchinbroke v. Seymour*, 1 Bro. C. C. 395; and if a settlement be ambiguously expressed, the Court leans strongly towards the construction which gives a vested interest to a child, when that child stands in need of a provision; usually as to sons, at the age of twenty-one; and as to daughters at that age or marriage, per Sir Wm. Grant, *Howgrave v. Cartier*, 3 V. & B. 86. *Emperor v. Rolfe*, 1 Ves. 309. *Cholmondeley v. Meyrick*, 1 Eden. 77. *Willis v. Willis*, 3 Ves. 51. *Hope v. Lord Clifden*, 6 Ves. 499. *Schench v. Legh*, 9 Ves. 300. *King v. Hake*, ib. 438. *Hallifax v. Wilson*, 16 Ves. 168. *Walker v. Main*, 1 J. & W. 1.

(3) So *Pearce v. Loman*, 3 Ves. 135. *Reynish v. Martin*, 3 Atk. 330, *contra*.

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same will he gave to his god-daughter, *Ann Prowse*, 500*l.* and to his godson, *Thomas Prowse*, 500*l.*, to be paid to them respectively at twenty-one or marriage, which should first happen; he also gave several other pecuniary legacies, and the rest of his goods and chattels to his trustees, whom he appointed his executors.

Thomas Prowse, the legatee, died under the age of twenty-one, and unmarried. The testator's personal estate amounted only to 680*l.*, and the money produced by the sale of the estates at *Mendford* and *Pinard* were not sufficient to pay his debts.

The bill was filed by the personal representative of *Thomas Prowse*, for payment of the legacy: and the principal question was, whether that legacy had been vested in *Thomas Prowse*, or had lapsed by his death under the age of twenty-one and unmarried.

Mr. Chute, *Mr. Fazakerley*, and *Mr. Murray*, for the plaintiff.

By the provisions of the testator's will, the fund which is made applicable to the payment of the legacy is become personal estate; for the testator has devised certain lands for the payment of debts and legacies, and has made the trustees his executors, and thereby has converted the land into personal estate, a devise to executors to sell, held legal assets, 1 Lev. 224. Dyer 264 b. n. 41. If the trustees had strictly followed the directions of the will, and had entered and received the rents and profits to an amount sufficient for the payment of this legacy, before the death of the legatee, that money could never have reverted back to the owner of the inheritance. The fund out of which this legacy was payable, was a personal fund, and the contingency of dying before the age of twenty-one, or marriage, being attached to the time of payment, and not to the bequest itself; the legacy has not lapsed by the event which has happened. This is not the case of a legatee dying before the time for payment of his legacy, and an heir at law, but this is a case between a legatee and devisee: for in the present case, both parties stand in the same degree of equity, and their claims must be decided according to the testator's intention, which in *Carter v. Bletsoe*, 2 Vern. 67., was considered to be the right rule. If this legacy is not payable, for whose benefit has it lapsed; the devise to the trustees is, until all the debts and legacies are paid. The limitation over is not to take place until all the debts and legacies are paid. The trustees took

an estate *quousque*, with a power of making leases, &c. The legacy is not charged solely upon the real estate, but the personal estate is primarily liable. The testator intended by charging his lands, to give an additional security for the payment of the legacy. The case of *Jackson v. Ferrand*, 2 Vern. 424., is a strong authority for the plaintiff. Considering this as a mere personal legacy, the plaintiff is clearly entitled, and as the testator's personal estate was sufficient for the payment of this legacy, the Court, if against the plaintiff upon the other grounds, will order the assets to be marshalled, that so much of the personal estate as may be necessary, may be left applicable to the payment of this legacy.

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Mr. *Attorney-General*, Mr. *Browne*, and Mr. *Floyer*, for the defendant.

The *Master of the Rolls* held upon a former bill, that this was a trust estate throughout. The representatives of the personal estate are not made defendants, so this is a demand merely out of the real estate.

We admit, that if this legacy has been charged solely upon the personal estate, it would have been payable, this Court in conformity to the doctrine of the Ecclesiastical courts, not considering such legacies as lapsed by the death of the legatee before the day of payment; but that rule has never been applied to legacies charged on land, nor is there any difference whether the question arises between a legatee and a devisee, or a legatee and an heir, or whether the legacy is charged on a mixed fund of real and personal estate, or upon land only. The only case relied upon by the plaintiff is *Jackson v. Ferrand*; but it appears from the report of that case in Prec. in Ch. 109., that the ground of the decision was, that a marriage had taken place, which is not so in the present case. The question in the *Duke of Chandos v. Talbot*, 2 P. Wms. 601., was of a legacy charged upon both real and personal estate. So also in *Jennings v. Looks*, 2 P. Wms. 276., and in *Yates v. Phettilplace*, 2 Vern. 416., *Carter v. Bletsøe*, 2 Vern. 617., and *Smith v. Smith*, 2 Vern. 92., were also cited. The question as to marshalling the assets cannot arise, for the personal representatives are not before the Court.

LORD CHANCELLOR.—There is not the least ground for considering the rents and profits of the lands already received by the trustees, or the monies arising from the leases which the testator has directed them to make, as personal April 28, 1738.

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assets. That would be to overturn the constant doctrine of this Court, for where there is a general devise in fee to executors to sell, it has never yet been determined that such an interest should be taken to be personal assets. Was it ever known that a legatee claiming a legacy upon such a devise, could go into the Ecclesiastical Court and compel the executors or trustees to account for the rents and profits. This is not a bare power only to the trustees to sell, but a general and express devise to them and their heirs, whereby the testator hath given to them the whole interest in the estate; the dispositions which he has afterwards made, are but declarations of the trusts.

As to the principal question, I confess that I have always had some doubt about the general rule which has been laid down, that where a legacy is charged both upon the real and personal estate, it shall by the party's death before the time of payment, be looked upon as extinct with regard to the real estate, though it would not had it been a charge upon the personal estate only, because it seems to me that the security for the payment of the legacy, which is the real estate, should be as extensive as the principal fund; but notwithstanding this doubt of mine, the point has been determined in so many instances, that I am bound by the decisions, particularly by that of *Poulet v. Poulet*, 1 Vern. 204, 321. Nor is there any difference whether the charge was created by deed or by will, or whether intended as a portion for a child, or as a legacy to a stranger, as appears from the case of the *Duke of Chandos v. Talbot*, 2 P. Wms. 601, 610, and *Jennings v. Laoks*, in the latter of which I was counsel.

It has been said, that this is a case in which the assets ought to be marshalled, for the purpose of throwing the debts upon the real estate, and leaving the personal estate open for the payment of the legacy, but if the executors were now before the Court, or if the bill were to be retained for the purpose of making them parties, I do not think that the present case could be brought within the rule for marshalling assets, which applies only where it was originally proper to be done, as where different demands were from the first chargeable upon different funds, and not where both demands having originally had the same security, one of them has by a subsequent accident, such as the death of a legatee under twenty-one, become chargeable upon one fund only.

The case of *Jackson v. Ferrand*, was decided upon the

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ground of the child having been actually married before her death, and from thence it may be inferred, that had she died under twenty-one and unmarried, the legacy would have been considered as gone. The case of the *Duke of Chandos v. Talbot*, is a very strong authority, because Lord King, who made that decree, was for a considerable time inclined to the other side; but was at last overpowered by the decision of *Yates v. Phettiplace*, 2 Vern. 416., and *Smith v. Smith*, 2 Vern. 92. It has been said, that the reason of this difference between legacies charged upon land, and those payable only out of personal estate, is founded upon the partiality with which the interests of heirs are supposed to be considered by the Court; but I take the real ground of the distinction to consist in this, that in the administration of personal assets, this Court has adopted the rules of the civil law, by which the Ecclesiastical Court are governed, and that by that law, a legacy is not lost by the death of the legatee before the day of payment; but that with respect to every thing which concerns real estates or interests out of lands, this Court follows the rules of the common law, and that at common law, if one promises to pay another a sum of money when he shall attain the age of twenty-one years, no action can be maintained before that time, and if the party dies before the age of twenty-one years, the money is lost for ever.

The bill was dismissed. (1)

(1) Mr. *Atkyns* states that the part of the above judgment which relates to the question, whether the produce of the lands decreed to be sold for the payment of debts was to be considered as personal assets, was interposed between the arguments for the plaintiff and those for the defendant; but that circumstance does not appear from either of the manuscript cases.

JONATHAN IVIE, an Infant, by GEORGE } Plaintiff; (1)
 ROOKE, his next Friend }
 and
 JOHN IVIE, BELFIELD, STRANGE, } Defendants.
 BUCK, and GEORGE IVIE, }

May 2nd, 1738.

1 Atk. 429.

A. by his will devises to his eldest son *Jonathan*, a real estate for life, remainder to his sons in tail-male, remainder to the testator's second son *John* for life, remainder to his sons in tail-male, remainder to plaintiff's father, *George Ivie* for life, remainder to his sons in tail-male, remainder over.

JONATHAN IVIE, the plaintiff's grandfather, by will, dated the 7th of March, 1717, devised to his eldest son, *Jonathan Ivie*, his manor of *Bearford*, with the advowson thereto belonging for life, remainder to his sons in tail-male, remainder to the testator's son, *John Ivie* for life, without impeachment of waste, remainder to his sons in tail-male, remainder to the plaintiff's father, *George Ivie*, for life, remainder to his sons in tail-male, remainder over; and also gave to the defendants *Strange*, *Buck*, and *Belfield*, two long annuities of 100*l.* each, in trust as to one for the plaintiff's father for life, and then to the plaintiff for life, remainder to the issue-male of his body, with divers remainders over. And as to the other, in trust for his son *Robert* for life; and in default of issue-male, remainder to the said *John Ivie* for life, re-

And also gave to three trustees, two long annuities of 100*l.* each, in trust as to one for the plaintiff's father for life, and then for the plaintiff for life, remainder to the issue-male of his body, remainder over; and as to the other, in trust for testator's son *Robert* for life, and in default of issue-male, remainder to *John Ivie* for life, remainder to his issue-male in tail-male, remainder to *George* for life, remainder to plaintiff for life, with divers remainders over; and appointed *John* his executor, who possessed himself of the title-deeds of the real estate, and the tallies belonging to the annuities.

Jonathan Ivie is dead without issue, *Robert* likewise without issue-male, and the son *John Ivie*, born after testator's death, is since dead, and his father has administered.

In 1720, *John* joined with *George*, in a sale of the annuity devised to *George* for 3,250*l.*, and the purchase-money was paid to *George*.

The plaintiff, the son of *George*, brings his bill to have the deed and writings relating to the real estate deposited in Court; and as to the annuity devised to *John* and to the plaintiff in remainder, to have security given for the payment of it, when his interest therein should take effect in possession.

And as to the other annuity, to have a satisfaction against *John*, for the breach of trust, in concurring in the sale thereof to the plaintiff's prejudice, and for an equivalent upon the death of his father, *George Ivie*.

(1) The whole of this case has been taken from *Atkyns*, the Lord Chancellor's note of it being very short, and no other report of it having been found.

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mainder to his issue-male in tail-male, remainder to the said *George Ivie* for life, remainder to the plaintiff for life, remainder to the plaintiff's issue-male, with divers remainders over; and appointed *John Ivie* his executor, who possessed the personal estate, together with the title deeds to the real, and the tallies and orders belonging to the annuities; and in 1720, without the consent of the trustees, subscribed them all into the stock of the South Sea Company.

Robert Ivie, after the death of the testator, died without issue-male; *Jonathan Ivie*, the testator's eldest son, died several years since without issue, and *John Ivie* had a son, who died since the testator, and the father has administered to him, and is now without any children. In the year 1720, the trustees declining to accept the trust, *John* joins with his brother *George*, in the absolute sale of the annuity devised to *George* for 3,250*l.*, and all the purchase-money is accordingly paid to *George*.

The plaintiff insists, that by the death of *Robert*, without issue-male, he is entitled to have the lands settled according to the will, and the produce of the long annuities; and therefore the bill is brought for an execution of the trusts in the will of *Jonathan Ivie* his grandfather, and that the deeds and writings relating to the real estate, may be deposited in Court, for the mutual benefit of all parties entitled thereto, and against his father and his uncle *John*. As to the annuity devised to *John* and to plaintiff in remainder, to have security given for the payment of this annuity to him, when his interest therein should take effect in possession, and as to the other annuity, to have a satisfaction against *John* for the breach of trust in concurring in this sale to the prejudice of the plaintiff, and that an equivalent might be provided for him to have the benefit of it, upon the death of his father, when the annuity would have come to him, if no such sale had been made thereof.

LORD CHANCELLOR was clearly of opinion, that as to the annuity devised to *Robert*, and afterwards to *John* for life, &c., that there being words of limitation annexed, such as would create an estate-tail in the case of a real estate upon the birth of the son of *John*, the whole interest in remainder vested in such son; and that *John*, as administrator to his son, is absolutely entitled to it; and as to this demand, dismissed the bill.

Wherever a trustee has been corruptly guilty of a breach of trust, the Court will compel such trustee to make satisfaction to the utmost; but as to the annuity sold by *John*, as it was at the instance of *George*, and the money received by *George*, he would not charge *John* with the price the annuity was sold at, but decreed that *George* and *John*, or one of them, do, at their or one of their own charges, purchase an exchequer annuity of 100*l.* a-year, for ninety-nine years, and assign the same to trustees, to be approved of by the Master, and the trusts thereof declared according to the limitations in the will.

Lord Chancellor
of opinion as to
the annuity de-
vised to *Robert*,
and afterwards

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as would create an estate-tail in the case of a real estate, upon the birth of the son of *John*, the whole interest in remainder, after the death of *John*, vested in such son, and that the defendant *John Ivie*, is absolutely entitled to that annuity as administrator to his son, and therefore, as to this demand, he ordered the bill should stand dismissed. (1)

As to the other demand, he said, when a trustee had, in a corrupt or unfair manner, been guilty of a breach of trust, the Court will sometimes compel such trustee to make a satisfaction to the utmost; yet, as *John* was induced in this case to come into a sale of this annuity at the pressing instance and request of his brother, in order to raise money, and the money was in fact received by *George*, he would not charge the defendant *John* with the price of the annuity, as it then sold, but decreed that *George Ivie* and *John Ivie*, or one of them, do, at their or one of their own charges, purchase an exchequer annuity of 100*l.* a-year for ninety-nine years of the like nature and value of the exchequer annuity which was sold, and assign the same to trustees to be approved of by the master, and that the trusts thereof be declared according to the limitations in the will; and further declared, that it appearing by proofs in the cause, the said annuity was so sold at the request of the defendant *George Ivie*, the tenant for life thereof, and that the purchase money came to his own use, the defendant, *John Ivie*, ought to be indemnified by *George* from the expence he may be put to by being obliged to purchase such annuity, and that in case *John* shall purchase such annuity, and assign the same to such trustees, or shall be at any expence in the purchase thereof, he shall be at liberty to prosecute this decree against *George Ivie* in the plaintiff's name, to compel *George* to purchase such annuity, and assign the same as aforesaid, in order to oblige *George* to reimburse *John* the principal money, which shall have been so laid out by him, in and about the purchase of such exchequer annuity, and the interest thereof, and all such expences as he shall have been put to as aforesaid; and that till *George* shall have so done, such growing

(1) So *Seale v. Seale*, 1 P. Wms. 290. *Butterfield v. Butterfield*, 1 Ves. 134—154. *Stratton v. Pague*, 3 Bro. Ves. 470. *Barlow v. Sabor*, 17 Ves. Parl. Ca. 257. *Earl of Chatham v. Tothill*, 6 Bro. P. C. 450.; and see 1 Madd. Rep. 488. *Glover v. Strothoff*, 2 Bro. C. C. 34. *Orandless v. Price*, 3 Ves. 99.; more fully reported in 13 Ves. 470. *Barlow v. Sabor*, 17 Ves. 470. *Ellon v. Eason*, 19 Ves. 73. *Donn v. Penny*, 1 Mer. 20. *Brouncker v. Bagot*, ib. 271.

payments of the annuity which shall be so purchased by *John*, as shall accrue during the life of *George Ivie*, be paid to *John* towards such indemnity, and directed the defendants *George* and *John* to pay the plaintiff his costs as to this part of the cause.

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As to that part of the bill which prayed the deeds and writings of the real estate, which were in the hands of *John* the tenant for life, might, for the better security of the plaintiff, in whom the inheritance was lodged, be taken out of his hands and deposited in Court; his Lordship agreed this to be the common practice in the case of a remainder-man, whose interest was expectant on a mere tenancy for life; (2) but as there was a contingent limitation to all the sons of *John*, and after that an estate for life in *George*, the plaintiff's father, he thought the plaintiff's interest too remote to warrant such a proceeding; and that, as such limitations are extremely frequent, if such a practice should be suffered to prevail, the title-deeds of half the estates in the kingdom might be brought into Court; besides, in the present case, the first tenant for life is not the heir at law; but takes by the will as well as the remainder-man, so that there is no danger of destroying the deeds, as there might be in case he was heir, in order to better his estate, and as there is no precedent for any thing of this kind, he declared he would not make one; and there-

His Lordship refused to direct the deeds and writings to be deposited in court, because the plaintiff's interest in the real estates was too remote to warrant it, and it is never done but in the case of a remainderman whose interest is expectant on a mere tenancy for life.

(2) It seems formerly to have been the common relief granted to a remainderman or reversioner against the tenant for life to have the deeds relating to the estate deposited in Court for safe custody, D. per Lord *Hardwicke*, *Southby v. Stonehouse*, 2 Ves. 612. *Reeves v. Reeves*, 9 Mod. 132. *Joy v. Joy*, 2 Eq. Abr. 284. pl. 4. Though such relief could not be given in favour of a son who was tenant in tail in remainder against his father who was tenant for life, being different from the case of a stranger, Lord *Lempster v. Lord Pomfret*, Amb. 154. *Pyncent v. Pyncent*, 3 Atk. 571.; otherwise where there was evidence that the father was destroying the deeds, D. per Lord *Hardwicke*, ib.; or where the deeds might be auxiliary to an action at law or relief in equity, or where discovery was sought for proper purposes, D. per Lord *Hardwicke*, Amb. Rep. 155. But now the

rule appears to be that the title-deeds should remain with the tenant for life, D. per Lord *Redesdale*, in *Bowles v. Stewart*, 1 Sch. & Lef. 223. And in *Knott v. Wise*, a manuscript case cited in *Duncombe v. Mayer*, 8 Ves. 323., Lord *Thurlow* is reported to have said, "That the remainder-man had not any action at law or any equity to take the deeds out of the hands of the tenant for life," *Duncombe v. Mayer*, 8 Ves. 323. So Lord *Thurlow* said, *prima facie* the deeds are properly in the custody of the tenant for life, *Ford v. Peering*, 1 Ves. jun. 76., and see *Webb v. Lord Lymington*, 1 Eden's Rep. 8. *Strode v. Blackburne*, 3 Ves. 225. But upon the confirmation of a widow's jointure the Court will order the deeds to be delivered up, Lord *Portsmouth v. Lord Effingham*; *Petre v. Petre*, 3 Atk. 511. *Scnhouse v. Earl*, 2 Ves. 450. *Leech v. Trollope*, ib. 662.

fore, as to so much of the plaintiff's bill as seeks to have the title deeds deposited in this Court, his Lordship ordered the bill to stand dismissed. (3)

(3) Reg. Lib. A. 1737. fol. 794.

BLATCH and AGNIS, in Behalf of them-
 selves, and all other Creditors of FRAN-
 CIS ELLIOT, deceased } Plaintiffs; (1)
 and
 WILDER and Others Defendants.

May 3rd, 1738.

1 Atk 420.
 A testator devises all his real and personal estate to be sold for payment of his debts, and appoints the defendant executor; the personal estate not being sufficient, a bill brought by bond and note creditors of the testator to be paid their demands out of the real estate. The question, whether the executor can sell the same, as the testator had given it generally to be sold, without directing who should sell.

FRANCIS ELLIOT being indebted to the plaintiffs by bond and note, and to several other persons, and being seized in fee in divers lands, part freehold and part copyhold, and of a considerable personal estate, having duly surrendered the copyhold, made his will, and thereby devised all his real and personal estate, whether freehold or copyhold, to be sold for payment of his debts, and appointed the defendants *Wilder* and *Agnis*, executors. *Wilder* alone proved the will, and took upon him the execution thereof, and the personal estate not being sufficient to pay his debts, the plaintiffs bring their bill to be paid their respective demands out of the testator's real estate.

The defendants admit the will; but *Wilder* the executor submits to the Court, whether he can safely proceed to a sale of the estate, in regard the testator had only given it to be sold generally, without directing who should sell the same.

(1) This case is taken from *Atkyns*. It appears in Lord *Hardwicke's* Note-book; but there is only the following note of his judgment: "Decree for an account and sale of the real estate."

No point appears to have been made in the cause, whether the real estate devised by the will was to be considered as legal or equitable assets.

Mr. *Fazakerley* insisted, the executor ought to sell, and for this purpose cited 2 Jo. 25. 2 Leon. 220.

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LORD CHANCELLOR.—I am of opinion, that money arising from the sale of lands devised to an executor for that purpose, or which the executor is empowered to sell, are legal assets in his hands, and administrable as such, (2) and

The money arising from the sale, is legal assets in the hands of the executor.

(2) Lord *ThurLOW*, says, "there must be a mistake in *Blatch v. Agnis*, for it was always held, that an estate devised to an executor to sell was equitable assets," *Newton v. Bennet*, 1 Bro. C. C. 137. But what is here stated to have been said by Lord *Hardwicke*, is consistent with the old cases, for it was formerly held that whatever came to the executors' hands, or they were intrusted with as trustees, should be considered as legal assets, Rol. Abr. 920. pl. 7. *Dethicke v. Caravan*, 1 Lev. 224. *Burwell v. Corrant*, Hard. 406. *Girling v. Lee*, 1 Vern. 63. *Hawker v. Buckland*, 2 Vern. 106. *Greaves v. Powell*, 2 Vern. 248. *Anon. ib.*, 405. *Cutterback v. Smith*, Prec. Ch. 127. *Bickham v. Freeman*, Prec. Ch. 136. *Walker v. Meager*, 2 P. Wms. 550., and though in some of the old cases a distinction prevailed where the executor and trustee were the same person, and an intention was shewn by the testator to separate the office of trustee from that of executor; as where a testator devised lands to trustees and their heirs upon trust for payment of debts, and afterwards made them executors, *Deg v. Deg*, 2 P. Wms. 417., and Mr. *Cox's* Note (1) to that case. *Hickson v. Witham*, Finch, 195. *Chambers v. Harvest*, Mos. 123. *Hall v. Kendal*, Mos. 328. *Prowse v. Abingdon*, ante p. 312. *Lewin v. Okeley*, 2 Atk. 50; or where a testator devised real estates to executors and their heirs; in both cases they were held to be equitable assets, *Silk v. Prime*, note in 1 Bro. C. C. 138. But now by modern cases, it seems settled that where the devisee of real estates unites the character of trustee and executor, a Court of Equity will prefer the character of trustee; and it makes no difference whether the real estate is devised to him, quasi

executor or quasi trustee for the purpose of being sold to pay debts, the money arising from the sale of the real estate will be affected with a trust, and will be considered as equitable assets, *Newton v. Bennet*, 1 Bro. C. C. 135. *Barker v. Boucher*, 1 Bro. C. C. 140, in note. *Batson v. Lindgreen*, 2 Bro. C. C. 94., but where the executor has a mere naked power to sell *quâ executor*, it seems doubtful whether they would be considered as legal or equitable assets, see *Silk v. Prime*, 1 Bro. C. C. 140., and see *Barker v. Boucher*, *ib.*

In former cases where an estate descended or was devised to an heir charged with the payment of debts, it was held legal assets, because the descent was not broken, *Freemoult v. Dedire*, 1 P. Wms. 430. *Plunket v. Penson*, 2 Atk. 290. *Young v. Dennett*, Dick. Rep. 452. *Allum v. Heber*, 2 Str. 1270., but by the later cases it has been held, and seems now to be settled that an estate devised to an heir, or which has descended to him subject to the payment of debts, will be considered as equitable assets, *Hargrave v. Tindal*, 1 Bro. Ch. Ca. 136, note. *Batson v. Lindgreen*, D. per Lord *ThurLOW*, 2 Bro. Ch. Ca. 94. *Bailey v. Ekins*, 7 Ves. 319. *Shiphard v. Lutwidge*, 8 Ves. 26.

If there be a mortgage for years and the reversion in fee left in the mortgagor, it will be legal assets, because the bond-creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion comes into possession, D. per Lord *Hardwicke*, in *Plunket v. Penson*, 2 Atk. 293.

But an equity of redemption of a mortgage in fee, *Cole v. Warden*, 1 Vern. 410. *Plunket v. Kirk*, *ib.* 411.

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such money, &c. being assets likewise in the same manner in the present case, it is a very reasonable construction, that the executor should be the person who should make the sale ; and therefore I decree that in case the personal estate should not be sufficient to pay the debts and legacies, that then the real estate of the testator, both freehold and copyhold, shall be sold, and likewise that the executors and the heir shall join in the sale, and all other proper parties as the Master shall direct. And his Lordship declared that the money arising by such sale be applied in satisfaction of the debts and legacies of the testator remaining unsatisfied, and that the surplus of the monies arising by such sale or sales doth belong to *Ann Elliott*, the widow of the testator, and in case any of the said testator's creditors by judgment or specialty shall take any part of their satisfaction out of the personal estate of the said testator, then they are not to receive any thing out of money arising by sale of the real estate till the other creditors are made up equal to them. (3)

It was agreed in this case, that where lands are devised to trustees to be sold for payment of debts, and the heir at law is an infant, he has no day given him to shew cause on his coming of age ; otherwise where there is no devise of lands expressly to any particular person, for in that case he has ; and this being one of these cases, his Lordship directed the infant, the customary heir of the copyhold premises, to join in the sale thereof, on attaining twenty-one, unless within six months after he shall attain such age, he shew cause to the contrary, and the purchaser of the copyhold in the mean time to hold and enjoy the same.

Sawley v. Gower, 2 Vern. 61. *Trevor v. Perryn*, 1 Ch. Ca. 148. *Barthrop v. West*, 3 Ch. Rep. 62. *Plunkett v. Penon*, 2 Atk. 293. *Clay v. Willis*, 1 B. & C. 364., or of a leasehold estate, are equitable assets, the case of *Sir Charles Cox's Creditors*, 3 P. Wms. 342. *Hartwell v. Chitters*, Ambl. 308. *Lyster v. Dolland*, 1 Ves. jun. 431. *Scott v. Scholey*, 8 East, 467. Judgment creditors, however, having a ge-

neral lien upon land, have a priority over bond and simple contract creditors in respect of the equity of redemption of a mortgage in fee, *Sharpe v. Earl of Scarborough*, 4 Ves. 538.

By the statute of Frauds the trust of an inheritance though not of a term are made legal assets, *King v. Ballett*, 2 Vern. 248., and see *Lyster v. Dolland*, 1 Ves. jun. 431.

(3) Reg. Lib. A. 1737. fol. 380.

LAWSON *v.* STITCH. (1)

May 5th, 1738.

JOHN LAWSON by will, dated the 20th of July, 1733, amongst other legacies, gave to the defendant 500*l.* to remain and continue at interest on such securities as he should die possessed of, or to be put out on government securities, at the election of his executors.

500*l.* to remain and continue at interest on such securities as he should die possessed of, or to be put out on government securities, at the election of his executors. Held, a pecuniary legacy.

1 Atk. 507.

A testator having 500*l.* upon mortgage and no other sum out upon security gives by will to the defendant

It appeared in fact, that the testator had a mortgage for the principal sum of 500*l.* on the estate of one Mr. *Pope*, and that he had no other sum out at interest; and it was insisted by the defendant, that he had several times declared that he would leave him the said 500*l.*

There being a deficiency of assets to answer all the other legacies given by the will, the question is, If this is a specific legacy? for if it is, it would not be liable to any proportionable abatement, with the other pecuniary legatees.

It was insisted by the *Attorney-General*, that this is a specific legacy; that it appearing the testator had in this mortgage sufficient to answer the charge, and that too appearing to be the only security the testator had, it must be presumed he intended this legacy should be satisfied out of this mortgage; that wherever any security itself is devised, or any part of the money due on such security, such legacy is always to be taken as a specific one, and in support of his argument, he cited the case of *Phillips v. Carey*, at the *Rolls*, the 14th of May, 1728. "There the testator devised a legacy of 1,000*l.* payable at the age of twenty-one or marriage, to be retained in the hands of *Atwell*, (who had money of the testator's in his hands, as his banker;) the *Master of the Rolls* held this legacy should

(1) This case is taken from *Atkyns*. "for account of assets and payment of In *Lord Hardwicke's* Note-book there "legacies." is only the following note:—"Decree

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"not carry interest, only from the time limited for payment, which is the case always of general pecuniary legacies; but that by this manner of devising this 1,000*l.* it was severed from the rest of the testator's estate; and specifically appropriated for the benefit of this legatee; and that it should carry interest immediately." (2)

A devise of a sum of money in a bag, &c. is a specific legacy, and shall not abate with pecuniary legatees.

LORD CHANCELLOR.—It is pretty difficult to make pecuniary legacies specific ones; but some such there are, as in the case of a sum of money in such a bag, the devise of a bond, or other security, or a devise of money out of such security, and in such case there can be no abatement. (3)

But this seems to me by no means a specific legacy; here is no particular charge of the legacy on this mortgage, and the election given to the executor plainly shews, the testator did not intend to make the mortgage the particular fund out of which the legacy should issue, but only gave the legatee a power of taking part of the mortgage money, if it should happen to be a subsisting mortgage at the time of his death, or if otherwise, that part of the testator's money, to the amount of 500*l.*, should be laid out in the purchase of some government security or other, to that value.

That the case at the Rolls was very different, for that was plainly a devise only of part of a debt due from *Atwell* to the testator, nor did this point come in judgment, or was it at all necessary to be determined there; the question only was, from what time the legacy should carry interest; and though it was held to carry interest immediately, yet it will not follow from thence it was a specific one, but liable to an abatement with the other legacies, if any deficiency had made that necessary.

Where a particular debt is devised, and afterwards recovered by the testator in an adversary way, it is an ademption of the legacy.

N. B.—It was said by the *Attorney-General* in this case, that where a particular debt was devised, or part thereof, and the same was recovered by the testator in his lifetime, in an adversary way, that will amount to an ademption of the legacy; otherwise, if voluntarily paid off by the debtor to the testator; it was admitted by the *Lord Chancellor* in this case, that distinction had prevailed, and that it was the practice of the Court. (4)

(2) Lord *Thurlow* in *Ashburner v. McGuire*, 2 Bro. Ch. Ca. 113., said that this case had often been denied to be law, vide *Heath v. Perry*, 3 Atk. 102. and notes.

(3) See *Purse v. Snablin*, post.

(4) This distinction was adopted by Lord *Harcourt*, in *Orme v. Smith*, 1 Eq. Ca. Ab. 302. pl. 2; by Lord *King* in *Rider v. Wager*, 2 P. Wms. 328; and Lord *Talbot* in *Partridge v. Partridge*, D. Cas. temp. Talb. 226; though

His Lordship declared, that the 500*l.* given to the defendant, is to be considered as a pecuniary legacy, and liable to abate in proportion with the other legatees.(5)

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Lord Talbot, in a prior case, was of a different opinion, *Ashton v. Ashton*, 3 P. Wms. 384; but Lord King afterwards held, that a compulsory payment should not be an ademption of a legacy, *Ford v. Fleming*, 2 P. Wms. 469; and Lord Macclesfield was of the same opinion, *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 461; for the insecurity of the debt might be a reason for its being called in; and see *Attorney-General v. Parkin*, Amb. 566. *Ashburner v. McGuire*, 2 Bro. Ch. Ca. 108. *Hambling v. Lister*, Amb. 401; but Lord Thurlow, in contradiction to all

the preceding authorities held, that the bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, *Stanley v. Potter*, 2 Cox's Cases, 180, and see *Pulsford v. Hunter*, 3 Bro. Ch. Ca. 415; and this decision of Lord Thurlow's has been followed by Sir Wm. Grant, in *Fryer v. Morris*, 9 Ves. 360, and by Sir John Leach in *Barker v. Rayner*, 5 Madd. 209; but see *Coleman v. Coleman*, 2 Ves. jun. 639, *contra*, and see *Roberts v. Pocock*, 4 Ves. 150.

(5) Reg. Lib. B. 1737. fo. 299.

JOSEPH CHAPMAN, MARY DICKEN-
SON, and BLISSET MARIA DICKEN-
SON, an Infant } Plaintiffs; (1)
and
ELIZABETH BLISSET, Widow, JOSEPH
BLISSET, MARY BLISSET, and ELI-
ZABETH BLISSET, Infants } Defendants.

—
May 6th, 1738.

Cas. temp.
Talb. 145.

Where a tes-
tator, after
giving certain
legacies to his
daughter, and
after charging
his real and
personal estate
with the pay-
ment of cer-
tain legacies,
annuities, and
20*l.* *per annum*,
for ten years,
for putting out
apprentices, as
his trustees

JOSEPH BLISSET, the testator, having issue one son, *Joseph*, and one daughter, *Sarah Dickenson*, who had issue one son, *Joseph Dickenson*, by his will, dated 16th of October, 1708, after giving several legacies to his daughter *Sarah Dickenson*, and amongst various other bequests, 200*l.* *per annum* to his wife charged upon his real and personal estate, and 30*l.* *per annum* to his grandson *Joseph Dickenson*, for his maintenance, till he came to the age of fifteen years, and then 200*l.* to put him out an apprentice, and from thence only 20*l.* *per annum* during his apprenticeship, and if he attained the age of twenty, then 1,000*l.*, and if twenty-three, then 1,000*l.* more; and after giving 100*l.* to put out certain

should appoint, devise and bequeaths all the rest and residue of his real and personal estate to trustees, their heirs, executors, and assigns, upon trust, to pay certain annual sums to his son *Isaac* for life; the rest and residue of the yearly rents and profits, during his life, to be applied for the maintenance and education of his children, except 100*l.* *per annum* to his wife, and after his son's decease, gives one moiety of the trust estate to such child or children of his son *Isaac* as he should have, their respective heirs, executors and assigns, and the other moiety thereof to the child or children of his grandson *Joseph*, and the child or children of his daughter, their heirs, executors, and assigns. *Isaac* having died before the birth of the plaintiff, who is the only child of *Joseph*; held, that by the devise of the real estate, the legal estate of inheritance vested in the trustees, and that the devise to the plaintiff was a contingent remainder of a trust estate, and that the legal estate in the trustees supported the contingent remainder. And part of the testator's personal estate, in the events which had happened, being undisposed of; held, that it should be divided amongst the next of kin, according to the Statute of Distributions; and that the testator's daughter being advanced in marriage, that her representative should not bring into *hotch-pot* the advancement made to the daughter upon her marriage. (2)

(1) The statement of this case, and Lord *Talbot's* judgment, are taken from the papers in the cause, the arguments of counsel from Lord *Hardwicke's* Note-book, and the judgment of Lord *Hardwicke* from a manuscript.

(2) The rule of *hotch-pot* does not

apply to persons who are legatees claiming under a partial intestacy; see this case, page 335, and see *Vachell v. Jefferys*, Pre. in Ch. 170. *Cowper v. Scott*, 3 P. Wms. 126. *Walton v. Walton*, 14 Ves. 318. But see *Ward v. Lant*, Pre. in Ch. 182.

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Poor children to be apprentices, with the approbation of his trustees, and 20*l. per annum* for ten years, to put out certain other poor children to be apprentices, as his trustees should appoint; devised and bequeathed all the rest and residue of his freehold and copyhold messuages and hereditaments in, &c., and all his leasehold messuages and hereditaments in, &c. and all his annuities in the Exchequer for ninety-nine years, and all his stock in the Bank of England, and all that was owing to him from, &c. and all other his freehold, and copyhold, and leasehold messuages and hereditaments, and all other his real and personal estate, of what nature or kind soever, not therein particularly devised and bequeathed, unto *Thomas Bland, John Cole, and Thomas Abbot*, their heirs, executors, and assigns respectively, in trust to pay his son, *Isaac Blisset*, at every quarter-day, 37*l. 10s.* for his support during his life, and upon this further trust, that if his said son should marry with the consent of his wife, and his trustees for the time being, then he appointed the further sum of 37*l. 10s.* a-quarter during his life should be paid to him, over and above the said first mentioned 37*l. 10s.* a-quarter, and if he should have any child or children, he gave the rest and residue of the yearly rents and profits of his said trust estate, over and besides the said yearly payments thereby bequeathed, to be applied during the life of his said son for the education and benefit of such child or children, and if his said son should marry with consent as aforesaid, then he gave his wife the yearly sum of 100*l. per annum* for her life, as a jointure after his said son's death, and then proceeded in these words, "And after my son's decease, I give one moiety of the said trust estate to such child or children of my said son *Isaac* as he shall leave, their respective heirs, executors, and assigns, and to the survivor of them, and the heirs and assigns of such survivor; and the other moiety of my said trust estate I give to the child or children of my said grandson *Joseph*, and every other child and children of my said daughter, their heirs, executors, and assigns, and to the survivor of them, and to the heirs and executors of such survivor; and if my said son *Isaac* should die without issue, then I give the first mentioned moiety to my grandson *Joseph*, and such other child and children as my said daughter shall have, and the heirs, executors, and assigns of my said grandson, and child and children of my said daughter; and if my said grandson and daughter shall both die without issue,

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" then I give the said moiety given to my said grandson and
" children of my said daughter to the children of my said
" son *Isaac*, their heirs, executors, and assigns ; and if my
" said son, daughter, and grandson, shall all die without
" issue, then and in that case, and from thenceforth, and not
" otherwise, I give the said trust estate, except a sum of
" 200*l.*, which over and above what I have already given
" her, I give to the said *Bridget Carter*, I give to and for
" the benefit of *Greenwich Hospital*, and I make my said
" trustees executors of this my will."

Isaac Blisset, the testator's son survived him, and died in 1728, leaving issue by his wife, the defendant *Elizabeth Blisset*, the other defendants *Joseph*, and *Mary*, and *Elizabeth Blisset*.

The testator's grandson, *Joseph Dickenson*, survived his mother and *Isaac Blisset*, and about four years after the death of the latter, had issue, one daughter, the plaintiff, *Blisset Maria Dickenson*, and died in 1733, having, by his will, given all his real and personal estate to his wife the plaintiff *Mary Dickenson*, and appointed her and the other plaintiff *Joseph Chapman*, his executors.

The object of the present suit was to have an account of one moiety of the surplus of the testator's estate, and one of the questions raised was " Whether the plaintiff *Blisset Maria Dickenson* was entitled to any interest in the testator's real estate, she not having been born until a considerable time after the death of *Isaac Blisset*, the particular tenant, and no trustees being interposed to preserve the contingent remainders."

The cause was first heard before the *Master of the Rolls*, who on the 6th of December 1734, decided in favour of the plaintiff *Blisset Maria Dickenson* upon that point.

From this decree, the defendant *Joseph Blisset*, the heir at law of *Isaac Blisset*, appealed, and the cause having been heard before Lord *Talbot*, his Lordship delivered his judgment as follows :

The general question is, whether the limitation to the plaintiff of a trust-estate be a good or a void limitation. If it be a void one, there is an end of the question as to the real estate.

It has been insisted upon that this is a limitation of a legal estate, and of a remainder of a legal estate, and not executory ; and if it be a legal devise for the life of *Isaac*, the rest of the remainders will be contingent remainders,

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which not taking place at the death of *Isaac* will be void, and therefore the first question is whether this be a limitation of a legal estate, or of a trust; and if of a trust, then how far such a limitation of a trust-estate will be good without trustees to preserve the contingent remainders.

The first question depends upon the will and intention of the testator, whether he intended that the estate should remain in the trustees for a particular time, and then go over executed in other persons. It is agreed that there was to be some legal estate in the trustees, for the things to be performed by them, do plainly require it; they were to pay *Isaac* 37*l.* quarterly, and 20*l.* a-year for 10 years, to put out apprentices.

The other things required, do not quite so clearly require a legal estate in the trustees. There being therefore these particular purposes, it is necessary that the estate should remain in the trustees till they are performed. But it is contended that although the limitation be to them and their heirs, yet it is to be considered as giving them the legal estate only during the life of *Isaac*, and that on his death the legal estate was to go to the devisees. As to this there is no case mentioned where a limitation indefinitely to trustees and their heirs (and which, in part, must give them a legal estate) has been considered as partly legal and partly not so. I do not say that it may not be so in some cases, but this is one of the most unfavourable cases possible where the making it a legal devise is only in order to defeat the intent of the testator; for, suppose *Isaac* had died before the expiration of the ten years, must the estate have been taken from them? and the will is to be construed as it stood at the death of the testator, and not according to events happening afterwards; and besides, what sort of a portion must this be, a legal estate for part of ten years, and a trust for the remainder? I therefore think that the devisees' interest cannot be considered as a legal estate.

Considering it therefore as a trust estate, the next question will be, whether the limitation to the plaintiff be a contingent remainder, or an executory devise?

As an executory devise, it would be good even in a legal limitation; and the only objection is, that it is limited *per verba de præsenti*, but this is of no weight with me, for the words must be considered as he used them. It appears that his grandson *Joseph* was an infant and young, and he knowing that his grandson had no children, devises a moiety to the child and

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children of his grandson *Joseph*. These words, indeed, import the present time, but as he knew that *Joseph* had no children, he must have intended them in a future sense.

This is confirmed by several of the other parts of the will, for the remainder over is given to such children as his daughter *shall* have, and the last provision he makes is in case his grandson and daughter *shall* both die without issue, and therefore it was impossible for him to shew his intention more clearly than he has done, that he meant such children as *should* be born.

In its creation therefore, when compared with the preceding limitations, it appears to be executory till *Isaac* had a child; but yet it is true that when *Isaac's* child was born, he had a freehold estate in the trust during the life of *Isaac*, so that the question will be, if this is considered as a remainder, whether on the death of *Isaac* before the contingency happened it became void. If this was a limitation of a legal estate, it would be clearly void, for the freehold cannot be in abeyance, and here was nobody to take it; but with regard to trusts, the reason of that rule fails; for if any question had arisen on those estates, bills might have been brought, and trustees inserted, who would have been answerable for any wrong done; and therefore though the general rule as to legal estates be so, and the construction of limitations of trusts be the same as of legal limitations, yet I do not apprehend that it holds in cases of contingent limitations or remainders, or that equity has gone so far as to say that contingent remainders shall be void for want of trustees to preserve them; for where is the necessity to make such trustees, when the whole legal estate is executed in the original trustees: and why should not their original estates preserve the whole trusts. Therefore, whether this be considered as an executory devise or contingent remainder of a trust estate, it is good, and the plaintiff is entitled to a moiety.

The decree directed that the proper accounts should be taken, and amongst other things declared that the defendants *Joseph*, *Elizabeth*, and *Mary Blisset* from the death of *Isaac Blisset* became entitled to one moiety of the residue of the said real estate, and to one moiety of the residue of the said personal estate; and that the plaintiff *Blisset Maria Dickenson*, became entitled to the other moiety thereof from the time of her birth; and that the rents and profits of that moiety of the real estate, and the interest and produce of that moiety of the personal estate which became

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due from the death of *Isaac Blisset* to the birth of the said *Blisset Maria Dickenson*, were not disposed of by the will of the testator; and that therefore the rents and profits of that moiety of the real estate during that time descended to the defendant *Joseph Blisset*, as heir at law to the testator; and that the interest and profits of the moiety of the personal estate during that time ought to be distributed according to the statute of Distributions.

Under this decree a claim was made before the Master on behalf of the infant plaintiff *Maria Blisset Dickenson*, as representing the testator's daughter, or of the other plaintiffs as personal representatives of *Joseph Dickenson*, to one moiety of the undisposed part of the testator's personal estate as one of the next of kin to the testator.

This claim was opposed on behalf of the defendants, the children of *Isaac Blisset*, upon the ground that the testator's daughter had received from her father 1,500*l.* upon her marriage, and that that sum ought therefore to be brought into the account.

This point having been brought before the Court upon petition on behalf of the plaintiffs, the *Lord Chancellor* directed that the plaintiffs should be at liberty to apply to have the cause re-heard.

The cause accordingly now came on to be re-heard upon that point, and upon a petition of re-hearing presented by the defendant, *Joseph Blisset*, the heir at law of the testator, against that part of the decree by which it was declared that the plaintiff *Blisset Maria Dickenson* was entitled to one moiety of the testator's real estates; he claiming that moiety as heir at law to the testator.

Mr. *Attorney-General* and Mr. *Floyer*, for the plaintiffs.

As to the undisposed part of the personal estate, it is a rule that *hotch-pot* does not prevail in cases of equitable and partial intestacy, whether arising from a lapsed legacy or an undisposed surplus, *Cowper v. Scott*, 3 P. Wms. 124. *Vachell v. Jeffreys*, Pre. Ch. 169. *Wheeler v. Sheer*, Mos. 288. 304.

As to the question relative to the moiety of the real estate, the defendant claims it as heir at law, insisting that the limitation to the children of *Joseph Dickenson* became void by the death of *Isaac Blisset*, before the birth of *Joseph Dickenson's* children; and in support of that claim insists, that the limitation was of the legal estate, and operated by way

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of remainder, and not by way of executory devise. We on the other side contend, 1st, That that limitation was an executory devise; and, 2dly, That if it was a contingent remainder, yet that the legal estate continued in the trustees, and that the remainder therefore was not defeated by the death of the first taker before the contingency happened. The trustees are directed to pay several annuities and sums of money, which they could not do without the legal estate. No contingency or time is mentioned at which that legal estate is to determine, and the ultimate devise to *Greenwich Hospital* is of a trust estate. If then the legal estate continued in the trustees, it would have been absurd to have introduced other trustees for the purpose of preserving contingent remainders.

The reason why the law requires a contingent remainder to vest during the life of the particular tenant, is to avoid the legal estate being in abeyance, which it never could be in the present case, for a *præcipe* might at any time have been brought against the trustees.

Mr. *Browne* and Mr. *Fazakerley*, for the defendant *Joseph Blisset*.

As to the first point, the rule of this Court is to distribute the undisposed part of the personal estate according to the statute of Distributions, which must include all the rules of that statute. In the civil law, the *Collatio bonorum* took place whether the deceased left a testament or not, Domat. 2. 694. 2 Inst. 33. The case of *Wheeler v. Sheer*, Mos. 288. 304, turned entirely upon the custom of the province of *York*. The case of *Ward v. Lant*, Pre. Ch. 184, is an authority for the defendant. As to the moiety of the real estate, we contend that the devise to the children of *Joseph Dickenson* was a contingent remainder, and not an executory devise; and that though the legal estate remained in the trustees during the life of *Isaac Blisset*, yet that the limitations over were of the legal estate. The intermediate estates may be legal estates, though the devise to *Greenwich Hospital* be of a trust estate; but supposing the limitations to be of trust estates throughout, the same rules as to contingent remainders must prevail in equitable as in legal estates.

May 6, 1738.

LORD CHANCELLOR.—The question as to the personal estate relates to a small part of the profits which arose between the time of the death of *Isaac Blisset*, and of the birth of the child of *Joseph Dickenson*. These profits the executors, having legacies under the will, cannot take, and

they consequently become an undisposed part of the personal estate.

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I am of opinion, that under the circumstances of this case, there should not be any *hotch-pot* of this undisposed part of the personal estate; but I do not say that this will be so in all cases.

Before the Statute there was no law for the distribution of personal estates, the administrators were entitled to the whole. The Ecclesiastical Courts indeed compelled them to account, and to make distributions; but prohibitions from the courts of *Westminster Hall* were always granted upon such compulsions, and before the Statute this Court never exercised a power over equitable intestacies, to compel the executors to distribute.

The only case in which the statute of Distributions operates as a law, is that of a complete intestacy; for where there is a will, and an executor appointed, this Court compels him to distribute as a trustee only, not by force of the Act, but of an equity drawn from it.

But in cases where the Act is not a compulsory law, but is adopted as a direction only to the Court, the Court will not follow it farther than the equity and reason of that Act require.

The object of the Act is to make certain persons inheritable; and the object of the provision as to *hotch-pot*, is to produce an equality amongst those persons. This Court, therefore, adopts that provision, where that object can thereby be obtained, as in cases where the whole personal estate falls under an equitable intestacy; but where a part only of the personal estate is undisposed of, and legacies are given by the will to the persons claiming that part, the bringing advancements made in the testator's lifetime into *hotch-pot*, would be so far from attaining an equality, that it would produce a directly contrary effect.

For it is admitted that the legacies cannot be brought into *hotch-pot*; it is plain, therefore, that an equality will not be produced by the adoption of that rule as to advancement. The cases of *Wheeler* and *Sheers*, and *Cowper* and *Scott*, and *Vachell* and *Jefferys*, are all in point, and are opposed only by the authority of *Ward* and *Lant*.

This Court will never follow the statute of Distributions as to *hotch-pot*, except in cases where an equality can be obtained by so doing.

As to the second point respecting the real estate, I am of

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opinion that the trust continues throughout. It is a complicated devise of real and personal estate to these trustees, and it is admitted that the trust continues as to the personal estate. The limitation is general to the trustees and their heirs. A devise to *A.* and his heirs, in trust for *B.* during his life, would certainly be a fee in the trustees, with a resulting trust after *B.*'s death for the heir at law.

I am of opinion that the whole limitation is a declaration of trust, and that the legal estate in fee, which remained in the trustees, will support the contingent remainders; for it is immaterial for the purpose of supporting contingent remainders, whether the whole legal estate, or whether a particular one for that particular purpose, is vested in trustees, for there will always be a tenant to the *præcipe* in any action which may be brought against the estate, to provide for which is the reason that abeyances are not permitted by law.

On one of the papers in the cause, the following note is indorsed in the *Lord Chancellor's* handwriting:—

I adjudged that there was no *hotch-pot* in this case, as to the undisposed part of the personal estate; and that by the devise of the real estate, the legal estate of inheritance vested in the trustees, and that the subsequent dispositions were trusts throughout, and consequently, that the legal estate in the trustees supported the contingent remainders.(1)

(1) Reg. Lib. A. 1735. fol. 298. Reg. Lib. A. 1738. fol. 681.

MATTHEW POWELL, Administrator of }
 ABIGAIL, his late Wife } Plaintiff; (1)
 and
 MARTHA HILL, Widow and Executrix }
 of ROPER HILL, and Administratrix }
cum testamento annexo of Sir ROGER } Defendants.
 HILL, ELIZABETH MARIA HILL,
 and Others }

May 11th, 1738.

SIR ROGER HILL had issue two sons, *Roger Hill* and *Locky Hill*, and two daughters, the plaintiff's late wife *Abigail*, and the defendant *Elizabeth Maria Hill*.

By marriage articles made on the marriage of *Roger Hill* with *Martha Hill*, certain

sums of money are agreed to be laid out in lands, to be settled upon *Roger Hill* for life, remainder to *Martha Hill* for life, remainder to the issue of the marriage, remainder to Sir *Roger Hill*'s right heirs; and another sum is agreed to be settled to the same uses, except that *Martha Hill* was to have no life estate therein. The husband being dead, and there being no issue of the marriage in 1729, *Elizabeth Maria Hill*, as the co-heir with her sister, becoming absolutely entitled to part of the sums, and entitled to another part, subject to the life estate of *Martha Hill*, in 1732, sells her interest therein to the plaintiff, who was a protestant; upon a bill brought by the plaintiff to have that part of the sums to which *Elizabeth Maria Hill* was absolutely entitled paid to him, and to have that part to which she was entitled, subject to the life estate of *Martha Hill*, laid out in the purchase of lands, to be settled pursuant to the articles; it was decreed accordingly, there being no evidence that *Elizabeth Maria Hill* was a papist at the time of the descent cast, though it was proved that in 1735, *Elizabeth Maria Hill* was a nun in a convent at *Lisbon*, professing the Roman Catholic religion.

Upon the marriage of *Roger Hill*, the eldest son of Sir *Roger Hill*, with the defendant *Martha Hill*, Sir *Isaac Shard*, the father of *Martha Hill*, agreed to pay 6,000*l.* as his daughter's marriage portion to trustees, and Sir *Roger Hill* agreed to pay them the like sum of 6,000*l.*, and covenanted that at his death his heirs and executors should pay the further sum of 12,000*l.*; and it was agreed that the said sums of 6,000*l.* and 6,000*l.* should be laid out in lands, to be settled to *Roger Hill* for life, remainder to *Martha Hill* for life for her jointure, remainder to the issue male of the marriage, remainder to Sir *Roger Hill* and his heirs; and it was agreed that the 12,000*l.*, when paid, should be laid out in land, and settled to the same uses as the said sums of 6,000*l.* and 6,000*l.*, except that *Martha Hill* was to have no life estate in the same.

(1) The statement of this case is taken from Lord *Hardwicke's* Notebook, the judgment from a manuscript report.

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Sir *Roger Hill* died in 1729, and soon afterwards his eldest son *Roger Hill*, and soon after him the younger son, *Locky Hill*, died, upon which the plaintiff's wife *Abigail*, and *Elizabeth Maria Hill*, became entitled as co-heirs. In 1725, some small portion of the 6,000*l.* and 6,000*l.*, was invested in the purchase of a small freehold estate at *Ux-bridge*, and the residue was afterwards invested in South Sea stock. The 12,000*l.* covenanted to be paid by Sir *Roger Hill* was never paid, or laid out in the purchase of lands.

By indentures of lease and release of the 15th and 16th October, 1731, and between plaintiff and his wife of the one part, and defendant *Elizabeth Maria Hill* of the other part, in consideration of 4,250*l.* paid by the plaintiff to *Elizabeth Maria Hill*, she conveys and assigns to the plaintiff, his heirs, and executors, all her share, right, and interest in the several sums, and the benefit of the covenants and securities, and all lands purchased or to be purchased with such money; *Abigail*, the plaintiff's wife, having died without issue on the 3d of April, 1732, and the plaintiff having obtained administration to his wife; *Elizabeth Maria Hill*, by bargain and sale enrolled, dated the 17th May, 1732, in consideration of the sum before paid to her, and of 10*s.*, bargains, sells, and assigns to the plaintiff all the said monies and the lands purchased or to be purchased, and the benefit of all covenants and agreements relating thereto.

The present suit was instituted for the purpose of having the estate purchased settled according to the marriage articles, and the residue of the 6,000*l.* and 6,000*l.* settled on *Martha Hill* for life, remainder to plaintiff in fee, and the 12,000*l.* with interest from Sir *Roger's* death, to be paid to the plaintiff.

The defendant *Martha Hill*, being the executor of Sir *Roger Hill*, resisted payment, upon the ground that *Elizabeth Maria Hill* was a papist, and disabled under the act 1 Jac. 1. c. 4. s. 6.

Evidence was given that *Elizabeth Maria Hill* was, in 1735, living at a convent in *Lisbon* as a nun, attending mass and professing the Romish religion, but the time of her going there was not ascertained.

May 11, 1738.

LORD CHANCELLOR.—I do not think that the facts established in this case are such as to bring the point of law into question. There is no evidence when *Elizabeth Maria Hill* went abroad, or with what intent she went. The only

thing proved is, that she is a papist, and in a nunnery at the present time.

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In order to bring her within the statute 1 Jac. 1., it must be shewn that before the descent cast, she went abroad with the intent there mentioned. For if she was not under the disabilities of that Act, at the time of the descent, the estate vested in her; and it was admitted, in the *Duchess of Hamilton's* case, that if the person was not disabled at the time of the descent, and as the estate vested, the disability subsequently incurred will not divest the estate, whatever may become of the pendency of the profits, and that such person may therefore certainly convey. The present case, therefore, is not brought within the statutes 1 Jac. 1. c. 4., 11 & 12 W. 3., or 3 Geo. 1. c. 18.; and I do not give any opinion upon the construction of those Acts.

The *Lord Chancellor* to his note of this case has added the following memorandum:—I decreed for the plaintiff, there being no sufficient proof that the defendant *Elizabeth Maria Hill* was under a disability at the time of the descent cast upon her, which was in February, 1729, it being proved only that she was a nun at *Lisbon*, in 1733; and as to the disability on the Act 11 & 12 W. 3., by reason of her being a papist, it appeared that this estate came to her by descent, and she was plainly the reputed owner thereof, and the plaintiff was admitted by all the answers to be a protestant purchaser for a valuable consideration, 3 Geo. 1. c. 18.

By the decree his *Lordship* directed that the *South Sea* stock, being the residue of the said sums of 6,000*l.* and 6,000*l.*, should be laid out in the purchase of lands, to be settled pursuant to the articles upon *Martha Hill* for life, remainder to the plaintiff in fee; and *Martha Hill*, admitting assets, directed that she should pay the 12,000*l.* to the plaintiff, with interest for the same, from the end of six months after the death of Sir *Roger Hill*.(1)

(1) Reg. Lib. B. 1737. fol. 303.

JOHN BURGOYNE, and ANNA MARIA, }
 his Wife } Plaintiffs; (1)

and

ROBERT BENSON, and the Executors }
 of the late LORD BINGLEY'S Will,
 GEORGE FOX, and HARRIET his } Defendants.
 Wife, the Daughter and Heir of LORD
 BINGLEY, and Others, }

May 12th, 1738.

1 Atk. 376.
 In 1714, Lord
Bingley con-
 vey's lands at
Cheshunt to
 himself for
 life, remainder
 to *Samuel Ben-*
son for life, re-
 mainder to his
 first and other
 sons, subject

to a power of revocation by Lord *B.*, if he settled lands in *Yorkshire* of as great or greater value to the same uses; by his will he devises the lands at *Cheshunt* to the plaintiff for her life; and by subsequent deeds, for the purpose of revoking the uses as to the lands at *Cheshunt*, conveys lands in *Yorkshire*, but which are of less value than the lands at *Cheshunt*, to the uses of the deed of 1714. *Robert Benson*, who was the eldest son of *Samuel Benson*, having refused to take the estate in *Yorkshire*, being of less value than the estate at *Cheshunt*: Held, that the power of revocation was not well executed by Lord *B.*, and that *Samuel Benson* was entitled to the estate at *Cheshunt*, but that he was a trustee of the estate in *Yorkshire* not for the plaintiff, the devisee of the *Cheshunt* estate, who was a volunteer, but for the heir at law of Lord *Bingley*.

By deeds of lease and release, dated the 25th and 26th of August, 1714, Lord *Bingley*, in consideration of his natural love and affection for his kinsman, *Robert Benson*, conveyed certain lands called *Cheshunt Nunnery*, then in the occupation of *J. B.*, at the rent of 120*l.* per annum, or thereabouts, to hold to the use of Lord *Bingley* for life, remainder to his first and other sons in tail-male, remainder to *Samuel Benson*, the father of *Robert Benson* for life, remainder to his first and other sons in tail-male, remainder to the right heirs of Lord *Bingley*. And it was thereby provided that Lord

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*, which has

been compared with another manuscript report, and in some few particulars altered by Lord *Hardwicke's* Note-book.

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Bingley should have power from time to time, by deed or writing to be signed and sealed in the presence of two or more credible witnesses, to revoke the uses thereby declared of the same lands or any part thereof, and thereby to limit or appoint any new uses, so as upon and at the time and times respectively of doing thereof, the said Lord *Bingley* should, in lieu thereof, convey and settle other lands, tenements and hereditaments in the county of *Yorkshire*, free from incumbrances, of as good or better yearly value than the lands and premises thereby granted were then worth, to the same uses and upon the same trusts, and for the same intents and purposes as the lands thereby granted were settled. There was also a power of leasing reserving a rent of not less than 120*l.* *per annum*.

Lord *Bingley* by his will dated the 27th of June 1729, devised to the plaintiff *Anna Maria Burgoyne*, for her separate use, his house called the Nunnery at *Cheshunt*, with all his estate, as well copyhold as freehold in the county of *Hertford* for life, with the household goods which should be there at his death. He also gave her an annuity of 400*l.*, and another house for life, and all his lands in *Yorkshire* and elsewhere he devised to trustees for the benefit of his only child, the defendant *Harriet Fox* for life, remainder to her first and other sons in tail, remainder over; and directed that his personal estate should be laid out in lands to be settled to the same uses.

By indentures of lease and release dated the 29th and 30th of June 1730, to which *Robert Benson* was a party, reciting the deed of 1714, and that Lord *Bingley* was desirous of revoking the uses of the nunnery at *Cheshunt*, and to settle other lands of the same value to the same uses; Lord *Bingley* revoked the uses of the nunnery at *Cheshunt*, and limited the same to the use of himself and his heirs, and conveyed the lands at *Hatton* in *Yorkshire*, to the uses of the deed of 26th of August 1714, and covenanted that those lands were of the yearly value of 120*l.*, and that he had full power to convey, and reserved to himself the same power of revocation.

After the death of Lord *Bingley*, a decree was made at the Rolls, by consent, for the payment of the 10,000*l.* portion to his daughter *Harriet Fox*.

Samuel Benson being dead, *Robert Benson* refused to take the estate at *Hatton*, because inferior in value to that at *Cheshunt*, and because it was subject to the term of

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1000 years for securing the 10,000*l.* portion, and insisted upon his title to *Cheshunt Nunnery* under the deed of 20th of August 1714, recovered that estate by ejectment.

The bill was brought by the devisee, under the will, of the *Cheshunt* estate, and prayed that the plaintiff might be declared to be entitled to that estate; or if *Robert Benson* should be held to be entitled to retain that estate, then that the plaintiff, in lieu thereof, might be declared to be entitled to the *Hatton* estate.

Mr. Noel, Mr. Fasakerley, and Mr. Murray for the plaintiffs.

The settlement of the *Cheshunt* estate by the deed of 1714, is well revoked by the will, or by the deed of 1730; for it was not necessary, by the former deed, that the estate to be settled as an equivalent, should be so settled at the particular time of the revocation, provided it was done in time to secure the interests of those claiming under it. The plaintiffs are entitled to the benefit of the covenant in the deed of 1730, so as to have the estate made up to the value of 120*l. per annum*, and to have the 10,000*l.* paid out of the personal estate, and so to remove that objection to the *Hatton* estate. The plaintiffs claim under the will, which is not revoked but confirmed by the subsequent deed of 1730. If one of two joint-tenants makes a will, and then the other joint-tenant dies, the whole of the land will pass by the will, *Perkins on Devise*, 500. So if one articles for a purchase of land and then makes his will, and afterwards takes a legal conveyance, the land passes, *Prideaux v. Gibbon*, 2 Cas. in Ch. 144. *Greenhill v. Greenhill*, 2 Vern. 679.

If the plaintiffs shall not succeed in obtaining the *Cheshunt* estate, yet they are entitled to the estate at *Hatton*; for if the settlement of 1714, had not been properly revoked, the legal estate of both is in *Robert Benson*, but as it is clear that only one was intended for him, and as he chooses to retain the estate at *Cheshunt*, he must hold the other as a resulting trust for the heir at law, and as against the heir at law, the plaintiffs are clearly entitled. The election of a third person ought not to prejudice them. Those who take under the will cannot defeat the testator's intention in any other point. *Streatfield v. Streatfield*, Ca. temp. Talb. 176. *Reeve v. Reeve*, 1 Vern. 219. *Noys v. Mordaunt*, 2 Vern. 581.

Mr. Attorney General for the defendant *Robert Benson*, insisted that the deed of 1714, was not revoked, and that it had been so determined by the recovery in ejectment. That

the *Hatton* estate, independently of the 1000 years' term, was not of equal value with the estate at *Cheshunt*, which, previous to Lord *Bingley's* death, was let for above 175*l.* *per annum*, whereas the covenant, if that was to be resorted to, was only that the *Hatton* estate should be of the annual value of 120*l.*, in which he disclaimed all beneficial interest.

Mr. *Floyer* and Mr. *Banks* for the defendant *Fox* and his wife *Harriet*, the heir at law, contended, that the deed of 1730 revoked the will by which the reversion of the *Cheshunt* estate might otherwise have passed, and that the estate at *Hatton* was to be considered as a resulting trust for the heir at law, the plaintiff being a mere volunteer, and not entitled to any equivalent for the devise intended for her by the will.

LORD CHANCELLOR.—The first question is, whether there was a good revocation of the uses of the deed of 1714, either by the will, or by the deed of 1730; and I am clearly of opinion that the power of revocation was not well executed in respect of the difference of the value of the two estates, and the term of 1000 years which covered *Hatton*, as part of the *Yorkshire* estate settled in 1703.

I am likewise clearly of opinion, that the deed of 1730, was a revocation of the will, *quoad* the devise of the *Hatton* estate, as part of all the testator's lands, &c., in *Yorkshire*, mentioned to be devised by the will; and therefore, *Hatton* could not be subject to the particular uses created by the will. Vide Shower's Parl. Ca. 150.

But as it was admitted, that though *Robert Benson* had the legal estate both in *Cheshunt* and *Hatton* estates, the former under the settlement in 1714, and the other in 1730; yet as one only was plainly intended him, and he chuses to adhere to the *Cheshunt*, &c. he must be a trustee as to the other estates, for some person or other who in equity has a right to it. And I think the heir at law of the testator will plainly be entitled to this trust; and the principal question therefore is, as between the plaintiff and the heir at law.

And as the plaintiff claims only under the will, and is therefore a mere volunteer, he is not entitled to any equity of this kind. It is quite a new attempt for a mere volunteer, not being a wife or child, to come to a Court of Equity to seek an equivalent for a void devise.

In the case of *Noys v. Mordaunt*, 2 Vern. 581., it is plain Lord *Cowper* went upon this, a provision which was

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BURGOYNE thereby to be made by a father for his child; and it is likewise in this respect distinguishable, that the dispute there was between persons who claimed under the same will, here it is between a devisee and the heir at law, who is always favoured.

In Reeve v. Reeve, 1 Vern. 219. particular notice was taken by the testator, in his will, of his apprehension that the 3,000*l.* charge would be good against the jointure. No express intention of any thing of that kind appears in the present case. Here it was likewise to make provision for an only daughter, and no inference can be drawn from those resolutions, in favour of a mere volunteer, as the plaintiff is.

N. B.—Held clearly by the *Lord Chancellor*, there was no pretence for paying off the 10,000*l.* charged on the term of 1000 years, out of the personal estate of *Lord Bingley*, but the land on which it was originally charged must bear the burthen of it; and what was done by the decree in this case could be only matter of agreement between the parties. (1)

His Lordship declared he saw no cause to give the plaintiff any relief in equity; and therefore ordered that the matter of the plaintiff's bill stand dismissed without costs.

(1) See *Bartholomew v. May*, ante, page 255, and the cases there cited, in note (2) to that case; and see *Coventry v. Coventry*, 2 P. Wms. 222. *Evelyn v. Evelyn*, 2 P. Wms. 664.

Lanoy v. Athol, 2 Atk. 444. *Tankerville v. Fawcett*, 2 Bro. C. C. 57. *Ward v. Dudley*, 2 Bro. C. C. 316. *Howell v. Price*, 1 P. Wms. 294. *Galton v. Hancock*, 2 Atk. 439.

EDWARD HEATHER, an Infant . . . Plaintiff; (1)
and
MARTHA HEATHER, ANN and ELI-
ZABETH HUNTINGFORD, JAMES } Defendants.
RIDER, and Others }

May 19th, 1738.

EDWARD HEATHER by his will, dated April 19, 1730, gave, 1 Atk. 425.
to his daughter, *Ann Huntingford* and the heirs of her *Edward*
body, 20*l.* a-year to be paid to her quarterly without any *Heather* by
abatement; and in case she died without issue then to his his will gives
sons *William* and *Edward Heather*, whom he appointed an annuity of
his executors, and who proved his will. 20*l.* to his
daughter and
the heirs of
her body and

appoints his son executor, who by his will gives to her and her daughter an annuity of
20*l.* to be paid out of real estate; and by an indorsement upon the will with a pencil,
“Directs that this annuity shall not be taken for another 20*l.* annuity, but to confirm the
20*l.* *per annum*, left her and her daughter by her father;” Held that the daughter was not en-
titled to both annuities; not upon the ground that the indorsement being unattested could affect
the real estate charged with the annuity; but by way of exoneration of his father’s personal
estate, he being the only person chargeable by way of personal demand as the executor
of his father.

William Heather died, leaving *John Heather* one of the
defendants, his eldest, and the plaintiff his second son.

Edward Heather, the son of the first named *Edward*
Heather, by his will, dated May 1, 1731, gave to his sister
Ann Huntingford and her daughter *Elizabeth*, 20*l.* *per an-*
num, to be paid quarterly without any abatement, out of
his five freehold houses in *Holborn*; but in case they died
without issue then the 20*l.* a-year was to return to the
plaintiff or the family of the *Heathers*. And after some
other bequests he gave all his real estate which he had of
his father and all his personal estate, stock in trade, money,
and securities, to the plaintiff.

Upon the back of the will in pencil, the testator indorsed
the following words, which were proved in the Ecclesiasti-
cal Court, as a codicil to the will:—“I hope the 20*l.* given
to my sister *Huntingford* herein will not be taken for another
20*l.* a-year; but to settle and confirm the 20*l.* *per annum*

(1) The statement of this case, and the arguments of counsel, are taken from
Lord *Hardwicke’s* Note-book. The judgment from *Atkyns*.

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her father left her and her daughter; and if they die without lawful issue let it come to my heir."

The *Master of the Rolls* having held that *Ann Huntingford* and *Elizabeth* her daughter were entitled to two annuities of 20*l.*; that question now came on before the *Lord Chancellor* upon an appeal from that decision.

Anne Huntingford having become a bankrupt, her assignees claimed the two annuities.

Mr. Attorney-General and *Mr. Floyer*, for the plaintiff, contended, that it being clear that the last testator, *Edward Heather*, did not intend that his sister *Ann Huntingford* and her daughter should take the annuity under his will and also that under the will of his father, one annuity only was payable; because otherwise *Ann Huntingford* and her daughter would be taking under the will and defeating its intentions at the same time.

Mr. Robinson, for *Ann Huntingford* and her daughter, contended, that the codicil not being attested could not operate upon the annuity, which by the will was charged upon freehold property; and that the annuity, as given by the will could not be considered as given in satisfaction of the annuity under the father's will, the one being given to *Ann Huntingford* in tail and the other to her and her daughter.

LORD CHANCELLOR.—The testator's intention is most plain, (if the Court can take notice of it) by the indorsement that his sister should have only one annuity, and that he was only willing to confirm and settle it on a more secure fund than a fluctuating personal estate, by charging it on his real estate, which was not done by the father's will.

If it had been inserted in the will, there could have been no doubt; but as nothing can be taken either to enlarge or diminish what affects a real estate, unless it be executed according to the statute of *Frauds and Perjuries*; and as the testator has not complied with the directions of that statute, this indorsement cannot be of any weight.

The indorsement of no weight, as nothing can either enlarge or diminish what affects real estates, unless it be executed according to the statute of *Frauds and Perjuries*.

In confirming one legacy to be a satisfaction for another, regard must be al-

I very much question if this last annuity can be taken as a satisfaction of the annuity given by the father's will, it being charged on a different fund, and given in another manner; for regard has been always had to the particular

ways had to the particular circumstances, limitations, and funds out of which the two several legacies are to arise. The daughter of *A.* not entitled to both annuities.

circumstances, limitations, and funds out of which legacies are to arise; yet I think she is not entitled to both annuities; but not so much on account of the codicil, as by way of exoneration of the personal estate of the father. He was the only person chargeable by way of personal demand, and might by codicil or testamentary schedule, which affects a personal estate according to the rule in the civil law, direct that in case his sister should take the annuity under his will, she should not have it out of his father's personal estate, but that his personal estate should be discharged therefrom; and taking it in that light, it does not contradict the statute of Frauds and Perjuries, and for that reason his Lordship altered Sir *Joseph Jekyll's* decree. (2)

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His Lordship declared, that in case the defendant, or the assignees under the said commission awarded against the defendant, *Ann Huntingford*, should insist on the benefit of the annuity of 20*l.*, given to her by the will of her brother, *Edward Heather*, in that case, they are not entitled to receive any benefit of the annuity of 20*l.* given to the said defendant, *Ann Huntingford*, by the will of her father, *Edward Heather*, payable out of his personal estate, and of whose will *Edward*, her brother, is executor. (3)

(2) See *Newman v. Newman*, 1 *Ilchester*, 7 Ves. 372.
 Bro. C. C. 186. *Thellusson v. Woodford*, 13 Ves. 223. *Ex parte* Earl of (3) Reg. Lib. A. 1737. fo. 569.

ANONYMOUS. (1)

May 31st, 1738.

THERE is no instance of appointing a receiver of the rents and profits of an infant's estate, where there is no bill depending in this Court; if it were only filed, there might be an application for this purpose on behalf of the infant.

1 Atk. 489.

The Court will not appoint a receiver of an infant's estate where there is no bill filed. (2)

(1) This case does not appear in Lord *Hardwicke's* Note-book. Ves. 445; and *Cherry v. Cherry*, at the Rolls, 1801, cited in 15 Ves. 449.
 (2) So *Ex parte Mountfort*, 15

EDES *versus* BRERETON. (1)

June 1st, 1738.

Persons concerned in the marriage of a ward of Court committed, though they were ignorant of her being a ward of Court.

UPON the petition of the uncle and guardian of the plaintiff, *Mary Edes*, who was a ward of the Court, and an infant under the age of sixteen, and whose fortune amounted to 8,000*l.*, against *Charles Pearson*, who was under the age of twenty, and who was the son of *Lord Tankerville's* steward, for marrying the infant clandestinely, without the leave of the Court; it was sworn by the petitioner, that the marriage was brought about by the contrivance of *Pearson* with *Lord Ossulston*; that *Lord Ossulston* went to *London*, and brought a parson from the *Fleet*, who had 100 guineas for marrying the couple; that they were married at *Up Park*, *Lord Tankerville's* seat. *Lord Ossulston* was present at the marriage, and gave the lady away as her father. None of these facts were denied by *Lord Ossulston's* affidavit, but both he and *Pearson* denied any knowledge of the orders of the Court, or that they knew that *Mary Edes* was a ward of Court.

Mr. Fazakerley, for *Pearson*, the husband.—*Pearson* is under age. The petitioner did not take proper care of the infant; he kept her under too much restraint, intending to marry her to his own son. *Pearson* did not know of the proceedings of this Court, therefore offended innocently. I admit that want of that knowledge is not an absolute excuse. The punishment of the husband will be the punishment of the wife too.

Mr. Noel, for *Lord Ossulston*.—There was an inadvertency in sending for the clergyman, but *Lord Ossulston* was ignorant of her being a ward of the Court.

LORD CHANCELLOR.—*Lord Ossulston*, by his affidavit, admits, that at the request of *Pearson*, he procured *Barry*, the parson, to marry them, and he denies knowledge of any of the orders of the Court. It is positively sworn by the petitioner, that the marriage was brought about by the contrivance of *Pearson* with *Lord Ossulston*; that *Lord Ossulston* went to *London* and fetched the parson from the *Fleet*,

(1) This case is taken from *Lord Hardwicke's* Note-book.

who had 100 guineas for marrying them; and that Lord *Ossulston* was present at the marriage, and gave away the lady as father, in a room at *Up Park*. None of these facts are denied by his affidavit. Let *Pearson, Mary Tench* the maid-servant, and Lord *Ossulston* be committed to the *Fleet* for their contempt. *Barry*, the parson, was committed by a former order.

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It appears from the Register's Book, that Lord *Ossulston* and *Mary Tench* having surrendered themselves to the warden of the *Fleet*, in obedience to the order of the 1st of June, presented a petition, shewing that they were ignorant of *Mary Edes* being a ward of the Court, and that they were sorry for their offences, which came on to be heard on the 13th of June, when they were, upon their undertaking payment of all the guardian's costs relating to this matter, discharged out of custody, on paying to the warden of the *Fleet* his fees.

On the 27th July, *Charles Pearson* presented a petition, stating his ignorance of the infant being a ward of the Court, and that he was sorry for his offence, and that he was willing and desirous as far as was in his power, and promised to settle upon the infant, when they both came of age, her real and personal estate. His Lordship ordered a receiver of the infant's real and personal estate, and that *Charles Pearson* should be restrained from conveying, disposing, or alienating any part of his said wife's real estate, without leave of the Court, and referred it to the Master to see what was proper to be allowed for the maintenance of *Charles Pearson* and his wife; and the said *Charles Pearson's* solicitor undertaking to pay the costs of the present application, he was discharged upon payment of the Warden's fees. (1)

(1) Reg. Lib. A. 1737. fo. 479. fo. 547.

<p>HENRY HERVEY, and CATHERINE, his Wife, ANN CLUTTON, Widow of THOMAS CLUTTON, deceased, which said CATHERINE and ANN are two of the Daughters of Sir THOMAS ASTON, Bart. deceased</p>	}	<p>Plaintiffs; (1)</p>
and		
<p>Dame CATHERINE ASTON, Widow of Sir THOMAS ASTON, Sir THOMAS ASTON, Bart., eldest Son and Heir of the said Sir THOMAS ASTON, deceased, Sir JOHN CHESHYRE, HENRY WRIGHT, and ANDREW KENDRICK</p>	}	<p>Defendants.</p>

On Appeal from an Order of the Master of the Rolls.

April 29th, Nov. 21st, 1737. June 5th, 1738.

1 Atk. 361.
Sir Thomas Aston, by settlement, reserving to himself a power of revocation, conveys certain estates to trustees for a term of years upon trust, in case he shall have one or more son or sons living at the time of his death, and more daughters than one living at that time, or who shall, in his life-time, be married with his consent, that then it may be lawful for the said trustees, by and out of the rents and profits of the premises, and by such interest, produce, and increase, as shall be made of the same, or by such mortgage or leasing thereof, or such ways and means as to them shall seem meet, to raise, levy, and receive for, and as the portion of every such respective daughter, the sum of 2,000*l.*, and after such respective sum of 2,000*l.* shall be so received and raised, shall and may pay to every such daughter the sum of 2,000*l.* at the respective days of their marriage, with the consent of Lady *Aston*, if living, and being his widow, or if she be dead or married again, then with the consent of the trustees, or the survivor of them, or the executors, administrators, or assigns of the survivor, and also by and out of the rents and profits of the premises, to pay yearly to each the sum of 50*l.* until the age of eighteen, and after that age, and until their marriage, with such consent as aforesaid, and during the life, and until the second marriage of their mother, 70*l.* yearly, and from and after their marriage, with such consent as aforesaid, or after the death or second marriage of their mother, the yearly sum of 100*l.*, until their respective marriages or deaths, which should first happen, and in case of the death of any of the daughters before they should be married with such consent as aforesaid, then the portion shall cease, and the estate be exonerated thereof; and if raised, shall be paid to the person entitled to the reversion of the estate, the funeral expenses of such daughters so dying before marriage, to be paid by the person entitled to the reversion.

Sir Thomas Aston, by his will, directs, that out of other real estates, (which he directs should be accounted as part of his personal estate) and out of all other monies to which he was entitled, certain sums shall be raised and paid to his daughters, to be for the augmentation of their portions, provided by the settlement, to be paid to them at such times, and subject to such conditions, provisoes, limitations, and agreements, as their original portions were made subject to; and in case any of his daughters shall happen to die, their additional portions are not to go to their personal representatives.

Two of the daughters of *Sir Thomas Aston*, after his death, having married without the consent of their mother, they were held not entitled either to the original portions provided by the settlement, or the additional portions given by the will. (2)

(1) The statement of this case is taken from papers in Lord *Hardwicke's* collection. The arguments of counsel, and the judgment of *Lee C. J.* and *Willes J.* from the *Lord Chancellor's* Note-book. The judgments of the

Master of the Rolls, Mr. Justice Comyns, and of Lord *Hardwicke*, from manuscript reports found in the collection of Lord *Hardwicke*, the latter of which is corrected by himself.

(2) With respect to legacies of per-

eight daughters, by indentures of lease and release, bearing date the 27th and 28th of May, 1712, between himself of the first part; Sir John Chetwood and John Crew, of the second

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sonal estate, conditions in restraint of marriage are void, whether they be precedent or subsequent, unless there be a devise over, in which case the devise over will take effect, *Reynish v. Martin*, 1 Wils. 130. 3 Atk. 330, S. C. *Jervois v. Duke*, 1 Vern. 20. *Pulling v. Reddy*, 1 Wils. 21. *Wheeler v. Bingham*, 3 Atk. 364. *Hemmings v. Munkley*, 1 Bro. Ch. Ca. 304. *Underwood v. Morris*, 2 Atk. 184, *contra*, the authority of which has been since questioned, see *Hemmings v. Munkley*, 1 Bro. Ch. Ca. 304. *Scott v. Tyler*, 2 Bro. Ch. Ca. 432. And see Hargrave's Jurisconsult Exercitationes, 2 Vol. 255. *Makolm v. O'Callaghan*, 2 Mad. 354.

To this rule there seems to be exceptions, as if the condition be precedent, and operates only up to the age of twenty-one, *Stackpole v. Beaumont*, 3 Ves. 89; (but this decision seems to be extra judicial, as it is apprehended that there was no condition annexed to the gift, but the party to whom the legacy was given, did not put herself in a situation to answer the description of the person to take; and see 3 Ves. 97. See *Scott v. Tyler*, 2 Bro. Ch. Ca. 432.) Or in the cases of alternative bequests, where the condition is likewise precedent, *Gillett v. Wray*, 1 P. Wms. 284. *Scott v. Tyler*, D. per Lord Thurlow Dicken's Reports, 722. But see *Hicks v. Pendarvis*, 2 Eq. Ca. Abr. 213. pl. 1. *Bellasis v. Ermine*, Ch. Ca. 22. It is otherwise where the condition is subsequent. *Garrett v. Priddy*, 2 Vern. 293. But a general residuary devise is not a sufficient devise over. *Parker v. Parker*, 2 Freem. 59. *Semphill v. Bayley*, Pre. in Ch. 562. *Garrett v. Priddy*, 2 Vern. 294. *Pagett v. Heywood*, cited in this case. *Amos v. Horner*, *contra*, denied by Sir Joseph Jekyl, but asserted by Willes C. J. to be an authority. The devise over must either be a special bequest on the event of not observing the condition, or tantamount to a special

bequest, as by specially directing the legacy to sink into the residue. *Wheeler v. Bingham*, 3 Atk. 364. *Lloyd v. Branton*, 3 Mer. 108. As to the difference between a condition precedent and subsequent, in respect of the vesting of a legacy, see *Atkins v. Hiccocks*, ante p. 114, and the notes to that case.

And where conditions of forfeiture are annexed to legacies, on marriage without consent, a Court of Equity has put a construction most favourable to prevent a forfeiture, per Lord Hardwicke, in *Daly v. Desbouverie*, post, and dispenses with a strict execution of the condition; as where consent is given conditionally on a proper settlement being made, which is offered to be made, but is not made until after the marriage; *Bostock v. Ireton*, Finch, 234. *Daly v. Desbouverie*, post; Or where the father imposes the condition of the consent of trustees, and a marriage takes place in his life-time, with his consent or subsequent approbation; *Wheeler v. Warner*, 1 Sim. & Stu. 311. *Farmer v. Compton*, 1 Ch. Rep. 1. *Campbell v. Lord Netterville*, cited in 2 Ves. 534. *Parnell v. Lyon*, 1 Ves. & Bea. 479. And see *D'Aguilar v. Drinkwater*, 2 Ves. & Bea. 234. *Clarke v. Berkeley*, 2 Vern. 720. *Smith v. Cowdery*, 2 Sim. & Stu. 358; Or where there has been a general permission to contract marriage as the party thinks fit, and a subsequent approbation of a marriage contracted under such general permission, *Pollock v. Croft*, 1 Mer. Rep. 181; Or where the condition becomes impossible, as where the consent must be of two, and one dies, *Peyton v. Bury*, 2 P. Wms. 626. *Jones v. Earl of Suffolk*, 1 Bro. Ch. Ca. 529; Or where one trustee has given his consent, the other having refused to act, *Worthington v. Evans*, 1 Sim. & Stu. 165. And it relieves where consent is withheld from a fraudulent or an unreasonable cause, *Mesgrett v. Mesgrett*, 2 Vern. 580. *Merry v. Ryves*, 1 Eden's Rep. 1; Or where

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part; and Sir *Robert Burdett*, since deceased, and Sir *John Chesshyre*, of the third part; conveyed to certain trustees and their heirs, all his manors, lands, and hereditaments, to hold the same to them and their heirs, to the use of himself for life, remainder as to the hall and park of *Aston*, and other part of the premises in *Cheshire*, to the use of his wife, the defendant, Lady *Aston*, during her widowhood, and so long as she should make *Aston Hall* the place of her usual residence; and as to the rest of the premises, and also the premises limited to Lady *Aston* after the determination of her interest therein, to the use of his son, the defendant, now Sir *Thomas Aston*, for life, remainder to trustees, to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to the second and other sons of the settlor, Sir *Thomas Aston*, by the defendant, Lady *Aston*, for life, remainder to their first and other sons in tail male, and for default of such issue, as for the premises in the counties of *Warwick* and *Berks*, to the use of Sir *Robert Burdett* and Sir *John Chesshyre*, for 1000 years, and as to the rest of the premises, as the respective uses thereof should determine, and also the premises in the counties of *Warwick*

a breach of the condition has been occasioned not by the fault of the person upon whom the condition is imposed, *O'Callaghan v. Cooper*, 5 Ves. 117. And see *Clarke v. Parker*, 19 Ves. 17. D. per Lord *Eldon*; Or where consent is given, and retracted upon improper grounds, Lord *Strange v. Smith*, Ambl. 264; But for a reasonable cause, consent may be retracted, *Dashwood v. Lord Bulkeley*, 10 Ves. 230. And see *Clarke v. Parker*, 19 Ves. 17.

It seems, however, that where the consent of all the trustees is required, that the consent of the major part is not sufficient. *Clarke v. Parker*, ib. D. per Lord *Eldon*; But what is stated by Lord *Eldon*, proceeded upon the ground that there was no case which decided that the consent of the major part of the trustees was sufficient, but see *Escott v. Escott*, and *Ventriss v. Glidd*, cited in this case, where it was held that the consent of one trustee was sufficient, the consent of two being required by the will. Such conditions do not extend to the case of

a widow, *Hutcheson v. Hammond*, 3 Bro. C. C. 145. *Crommelin v. Crommelin*, 3 Ves. 227.

But these rules do not apply to lands, or interests arising out of lands; for it is a known and settled maxim of law, that if lands, or interests out of lands, are given on condition precedent, nothing vests till the condition be performed; Vide this case, *Bertie v. Lord Falkland*, 3 Ch. Ca. 130. *Fry v. Porter*, 1 Mod. 300. *Reynish v. Martin*, 3 Atk. 332. *Randall v. Payne*, 1 Bro. Ch. Ca. 55. *Duffield v. Elwes*, 1 Sim. & Stu. 239. *Long v. Ricketts*, 2 Sim. & Stu. 179. And where the condition is subsequent, if it be a condition in restraint of marriage without consent, the breach of the condition operates, by divesting the estate which was before vested. 1 Roll. Abr. 418. pl. 6. *Fry v. Porter*, 1 Mod. 300. And see *Popham v. Bampffield*, 1 Vern. 83; But in order to work a forfeiture against an heir at law, he must have notice of the devise, *Burleton v. Humfrey*, Amb. 258.

and *Berks*, after the determination of the term of 1000 years, to the use of the first and other sons of the settlor, Sir *Thomas Aston*, by any other wife, in tail male; remainder to the first and other daughters of the defendant, now Sir *Thomas Aston*, in tail male; remainder to the first and other daughters of the second and other sons of the settlor, Sir *Thomas Aston*, in tail male; remainder to the first and other daughters of the settlor, Sir *Thomas Aston*, by the defendant, Lady *Aston*, in tail male, with divers remainders over.

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The trusts of the term of 1000 years were declared to be that in case Sir *Thomas Aston*, the settlor, should die without issue male by his wife Lady *Aston*, or having issue male who should die before marriage and before the age of twenty-one years, and should have only two daughters by his wife Lady *Aston* living at the time of his decease, or who in his life should have been married with his consent; That in that case and not sooner or before, Sir *Robert Burdett* and Sir *John Chesshyre* and the survivor of them, and the executors, administrators, and assigns of such survivor should take and receive the rents, issues, and profits of the premises limited to them for 1000 years, and by such interest, produce, and increase as should be made or raised by the same or any part thereof, or by such mortgage or leasing thereof, or of any part or parcel thereof, or such ways and means as to them should seem meet, raise the sum of 5,000*l.* and the same so raised pay and deliver to or to the use of the younger of such two daughters, when and as soon as she should be married with the consent of the defendant, Lady *Aston*, if then living and not married again, and if dead or married again, then with the consent of Sir *Robert Burdett* and Sir *John Chesshyre*, or the survivor of them, or the executors, administrators, or assigns of such survivor; and upon this further trust that the said Sir *Robert Burdett* and Sir *John Chesshyre* and the survivor of them and the executor administrator or assigns of such survivor, should yearly after the death of Sir *John Aston* the settlor without issue male raise and pay to such younger daughter out of the rents issues and profits of the said premises until her marriage with such consent as aforesaid and during the life of the defendant Lady *Aston*, and until the second marriage of the said Lady *Aston* the yearly sum of 100*l.* and from and after the marriage of such daughter with such consent as aforesaid, and after the decease or second

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marriage of the said defendant Lady *Aston* the sum of 250*l* *per annum* until the said sum of 5,000*l*. should be raised and paid; and after providing for the event of there being more than two daughters, and a son and only one daughter; it was further declared that in case the said Sir *Thomas Aston* the settlor should happen to have one or more son or sons of his body by his wife the defendant, Lady *Aston*, living at the time of his death, and should happen to have more daughters than one living at the time of his death or who should be in his lifetime married with his consent as aforesaid, that then it should be lawful for the said Sir *Robert Burdett* and Sir *John Chesshyre* and the survivor of them and the executors administrators and assigns of such survivor by and out of the rents issues and profits of the said premises so limited to them for the term of 1000 years as aforesaid, or by such ways and means as aforesaid to raise levy and receive for and as the portion of every such respective daughter, the sum of 2,000*l*. and after such respective sums of 2,000*l*. should be so had received and raised, should and would well and truly pay or cause to be paid unto every such daughter respectively the respective sums of 2,000*l*. at the respective days of their marriage with such consent as aforesaid, and also that it should be lawful for the said Sir *Robert Burdett* and Sir *John Chesshyre* and the survivor of them and the executors administrators and assigns of such survivor by and out of the rents issues and profits of the said premises so limited to them for 1000 years yearly from and after the decease of the said Sir *Thomas Aston* the settlor to pay and satisfy to the said daughters the respective yearly sum of 50*l*. a-piece until their respective attainment of the age of eighteen years and after their respective attainment of that age and until their respective marriage with such consent as aforesaid, and during the life of the said defendant Lady *Aston*, and until the second marriage of the said Lady *Aston* the respective yearly sum of 70*l*. and from and after the respective marriage of such daughters with such consent as aforesaid and after the decease or second marriage of the said defendant Lady *Aston*, then the respective yearly sum of 100*l*. until their respective marriage or death which should first happen. And it was thereby agreed by and between all the parties to these presents; and it was thereby declared that if any of the said daughters should depart this natural life before she or they should be married with such consent as aforesaid that then the sum or

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sums intended for the portion or portions of her or them so dying should cease and the said premises be exonerated therefrom, and if raised and so far as the same should be raised should remain and be payable unto such person or persons to whom the remainder or reversion of the premises expectant upon the said term should for the time being belong or appertain, the funeral expenses of such daughter or daughters so dying before marriage to be first paid and satisfied by such person or persons to whom the remainder or reversion should so belong or appertain.

By this deed a power of revocation and of new appointment by deed or will was reserved to Sir *Thomas Aston*.

Sir *Thomas Aston* afterwards, by his will, dated the 26th of February, 1722, after taking notice of the above settlement, of 28th of May, 1712, and that the manor of *Southrey*, and certain other lands in the county of *Norfolk*, had lately been devised to him, subject to the payment of certain sums amounting to 3,100*l.* which he had paid, and that his personal estate designed for the benefit of his daughters was thereby much diminished, devised the said manor of *Southrey*, and the said other lands in the county of *Norfolk*, to the defendants, *Henry Wright* and *Andrew Kendrick*, for 500 years, without impeachment of waste, upon trust, by sale or mortgage, within six months after his decease, to raise the said sum of 3,100*l.*, and to pay the same to his executrix, to be accounted as part of his personal estate, and to come in lieu of what had been so paid by him. And he further devised certain lands in *Frodsham*, in *Cheshire*, which he had lately purchased, to the same trustees, for a term of 500 years, without impeachment of waste, upon trust, within six months after his death, by sale or mortgage, to raise 1,000*l.*, and to pay the same to his executrix, to be accounted part of his personal estate, and subject to the said terms of 500 years and 500 years, he devised the said premises in *Norfolk* and *Frodsham* to the same uses to which the manor of *Nun Eaton* was limited by the above settlement. And he further directed that out of the said sums, so to be raised and paid out of the said *Norfolk* and *Frodsham* estates, and out of all other monies to which he should be entitled at his death, except what might be in the actual possession of himself or his wife, there should be paid to his daughters, who should be unmarried and unprovided for by him at the time of his death, the sum of 2,000*l.* if the same would extend so far, and if not, so

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much as the same would extend to pay equally amongst them, to be for the augmentation of their portions, provided for them by the said settlement, to be paid to them at such times, and subject to such conditions provisoes limitations and agreements as their original portions were by the said indenture made subject and liable; and in case any of his daughters should happen to die before her or their original portions should become payable, then his will was, that the said 2,000*l.* should not be paid to the executors or administrators of them so dying; and in case the money out of which the said sum of 2,000*l.* a-piece was to be raised, should be more than sufficient for raising the 2,000*l.* a-piece for his daughters, he gave and bequeathed the residue thereof unto his wife, the defendant Lady *Aston*, to whom he gave and bequeathed all the rest and residue of his goods chattels and personal estate not thereinbefore given and bequeathed, and appointed her sole executrix of his will, and gave to her the custody and guardianship of all his children until their ages of twenty-one.

The said Sir *Thomas Aston*, by a codicil to his will, dated the 17th of July, 1723, after reciting the provision made for his daughters' portions, by the indenture of the 28th of May, 1712, and his power of revocation, and that the term limited for the purpose of raising such portions would not commence until after other estates of inheritance, so that his daughter would have no benefit therefrom at his death, or until the death of his son without issue male, directed that the said term of 1000 years should commence from and after his decease, before the estate limited to his son, and for the better raising the said portions, he directed that all the lands settled by that indenture, except the lands in *Cheshire*, should be subject to that term of 1000 years, for the better raising of the portions by that indenture appointed to be raised according as the same were therein and thereby appointed to be raised and paid; and for better raising such portions, he directed and appointed that the said lands in *Cheshire*, except certain parts thereof limited to his wife during her widowhood, should be to the use of the same trustees, upon trust to pay his son certain annual sums, until his age of twenty-five years, out of the rents and profits, and to apply the rest and residue of the rents and profits for and towards the raising of the said portions of his daughters; and he declared his will to be, that the estates and uses in the said indenture limited, after his decease

should give way and place to the several uses therein and thereby limited.

Sir *Thomas Aston*, the father, died in the month of January, 1724, leaving only one son, the defendant, Sir *Thomas Aston*, and eight daughters. The defendant, Lady *Aston*, proved his will.

In Easter Term, 1725, a bill was filed on behalf of the daughters, praying that the will and codicil might be established and the trusts performed.

By a decree in that cause at the Rolls, of the 6th of December, 1725, it was declared, that the will and codicil were well proved, and that the plaintiffs were entitled to, and ought to enjoy the benefit of the respective provisions made for them by the settlement, will, and codicil, and directed the several maintenances to be paid accordingly, and reserved liberty to the plaintiffs to apply for their respective portions as they should become payable.

After this decree, the plaintiff, *Henry Hervey*, married *Catherine*, and *Thomas Clutton* married *Ann*, two of the daughters of Sir *Thomas Aston*. The suit having thereby become abated, in Trinity Term, 1734, the present bill of revivor was filed by *Henry Hervey* and *Catherine* his wife, and *Thomas Clutton* and *Ann* his wife.

Lady *Aston*, in her answer to this bill, stated that her daughter *Catherine* had married without her consent, after both she and her husband had had notice of the provisions of the settlement, as to the necessity of such consent; that she had refused her consent because Mr. *Hervey* had no property by which he could make any provision for his wife or family. That her other daughter *Ann* had also married without her consent, and under the age of twenty-one years, after having had notice of the provisions of the settlement.

This answer was not replied to, but on the 16th of April, 1736, *Henry Hervey* and *Catherine* his wife, and *Thomas Clutton* and *Ann* his wife, presented a petition to the Master of the Rolls, for the payment of the portions of 2,000*l.* a-piece, claimed to be due under the settlement, will, and codicil, to Mrs. *Hervey* and Mrs. *Clutton* upon their respective marriages, stating that they had no other provisions whatsoever, and the husbands respectively offering to make such settlements of the said portions as the Court might think proper.

This petition came on to be heard on the 29th of May, 1736, when his Honour ordered the payments of the main-

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tenance to be continued, and took time to consider as to the payment of the portions.

On the 5th of November, 1736, his Honour, after fully stating the case, delivered the following judgment:—

This being a case of great consequence and concern, as well to the public as to private families, I have taken time to consider of it, that I might look into all the cases that are in the books, and find out what would result from them, and from the nature and reason of cases of this kind, and might contribute any endeavours to the fixing of a rule for judging in cases of this nature.

The general question is, whether the original and additional portions, or either of them, became payable upon the marriage of these ladies without the consent of their mother.

I observe that the marriage of Mrs. *Hervey* was after twenty-one, that Mrs. *Clutton's* was at nineteen; that Mr. *Hervey* was expressly acquainted with the condition annexed to the payment of the portions; and though it doth not appear Mr. *Clutton* was, yet I think, these or any other different circumstances attending the two marriages, makes no difference between one case and the other as to the matter in judgment.

Before I distinguish between the original and additional portions, I shall take notice of some things that are common to them both:—

1. They are provisions for children.
2. The loss of these provisions is a penalty.
3. This Court can impose upon the husbands terms or conditions, by way of settlement on the wives and their issue, as shall be thought reasonable, and this the petitioners submit to.

1. These are provisions for children.

Now provisions for children are not merely voluntary, parents are obliged to make a reasonable provision for them at their death, as well as in their lifetime, and if they did not, the law did it for them. The writ *De Rationabili parte bonorum* is to supply the want of such a provision, and this was anciently the common law of England, and how it came to be confined to particular places does not appear, Fitz Herbert's *Natur. Bre.* new edit. 284, 285. However, nature obliges every parent to make a reasonable provision for his child, and in this Court children have an equity, as creditors or purchasers have, though not in equal degree, they being a middle species between those and volunteers; and this Court

makes good provisions for them defective in point of law. It helps them against the law. I need not mention instances, they are well known.

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2. The loss of these provisions is a penalty.

It is said the portions here demanded are not payable but upon a condition precedent, and that not being performed, they never vested, and then the petitioners cannot be said to lose that which they never had.

Supposing this to be so, yet this is a legal distinction, not an equitable one, for children have a natural and antecedent right to a provision from their parents, and upon that foundation this Court relieves them; indeed, the *quantum* of that provision is left to the parent, and in the present case Sir *Thomas Aston*, the father of the petitioners, hath fixed it, and hath thought 4,000*l.* a-piece a reasonable provision for his daughters.

3. This Court can impose terms or conditions upon husbands, by way of settlement upon their wives and upon their issue.

This is a power the Court is in possession of, for how long time I do not know, but it was so in 26 Car. II. as appears by the case of *Shipton v. Hampson*, Rep. of Cases in the time of Lord *Nottingham*, 145, 146, and is now fixed and established.

The Court, in these cases, acts *vice parentis*, which affords a very good reason for this Court not to be strict and rigorous in judgment; these are considerations common to both the original and additional portions.

I come now to distinguish betwixt the one and the other, and because the question concerning the additional portions is the least difficult, and may lead to the consideration of the other, I shall therefore invert the order, and begin with the consideration of the additional portions.

And I am of opinion these portions did, by the marriage of the petitioners, become due, and ought to be paid.

Nothing is more certain and established, than that a legacy, given upon condition that the legatee marry with the consent of a third person, even of a parent, is due upon a marriage without such consent, unless it be given over.

Testamentary cases are of ecclesiastical cognizance, and must be judged by that law. The civil law, where it doth not differ from the canon law, is taken as part of the ecclesiastical law, and both these laws here in England have their sanction from, and are controulable by usage or practice, and thus they constitute the King's ecclesiastical law.

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Swinburne, an author often quoted and relied on in this Court, in his Treatise of Wills, p. 242, 243, lays it down as a general rule, that all conditions against the liberty of marriage, particularly conditions of marrying with the consent of another, are unlawful. The reasons given for the general rule are, that conditions in restraint of marriage are repugnant to the law of nature, and are hurtful to the commonwealth, whose interest it is that the country should be thoroughly peopled. That in the case of a condition to marry, with the consent of another, the person whose consent is to be procured, may make a hard choice, either by reason of the dislike of the parties, inequality of age, disagreement of manners or the like, which, if it were suffered, says Mr. *Swinburne*, would breed greater mischief, than if marriage without such consent, were endured. But then he makes a condition of marrying with the consent of another lawful as to part, viz. the marrying, and unlawful only as to the consent of the person, which shews it cannot be said in the present case, absolutely, that the condition is not performed, for it is performed in the reasonable, though not in the unreasonable part of it.

Pigott's case, as cited by *Winch J.* as a foundation for his opinion in the case of *Gresley v. Luther*, Moor. 857, in every material circumstance, comes up to the present case; a legacy was given to a daughter on condition she married with the consent of her mother, she married without such consent, and notwithstanding this, had a sentence (in the spiritual court it must be) for the legacy. I mention this as an authority to shew what the rule of the ecclesiastical law is, as agreed to by a Judge of the common law. But *Swinburne* goes further, and p. 245 puts the case of a legacy upon a condition in restraint of marriage given over to pious uses; in this case, says he, the condition is not to be rejected as unlawful, for the law doth more favour piety than the liberty of marriage; which particular reason shews his opinion, that where a legacy is given over, and not to pious uses, the restraint of marriage is unlawful. Agreeable to this opinion it is said, the civil law is so, by my Lord *Hale*, 1 Mod. Rep. 308. 1 Ch. Ca. 142. and Abr. of Cases in Equity, 110.

After all, this Court hath in some measure departed from the rule of the civil law, and where the legacy is given over, hath held, and I believe the ecclesiastical courts too have held, the condition throughout valid; but where the legacy is not given over, this Court hath constantly held the con-

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dition was intended to be only *in terrorem*. Before I go into authorities, let us see whether there be a foundation for this notion of a condition intended *in terrorem*, which I own at first sight seems to be too imaginary for a Court of Justice to build upon, but upon examination it will be found to be substantial, and to be made good by nature and reason.

1. By nature.

I think there is a foundation in nature for construing such conditions to be meant only *in terrorem*; generally, these conditions are annexed to legacies given by parents to children; such is the present case, and *ad ea quæ frequentius accidunt jura adaptantur*. Mr. Swinburne says, conditions in restraint of marriage are against the procreation of children, and repugnant to the law of nature. It is certain, mutual affection, or good liking of the contracting parties, is the natural inducement to marriage, and this is personal, and so these conditions are against nature with respect to the contracting parties, nor are they less against nature with respect to their parents. Let a parent, if he were living, be asked, if his daughter married against his consent to a man of no fortune or means of livelihood, which is the case he would most likely provide against, let him consult natural affection, lay his hand upon his heart, and let him say whether he would leave his child destitute of all manner of provision; surely he would not be so severe: if not, this consideration creates a strong presumption that where a father at his death leaves a portion to his child, on condition of her marrying with the consent of another, that such condition was only intended to be *in terrorem*: but it is said, if this be known, it will not be *in terrorem*; then I ask, how long it will be before this is generally understood, and when it is, if a father would be so strict, he might, by giving the legacy over to another child or relation, make the condition effectual.

2. I say, the construing such a condition to be intended only *in terrorem*, may be justified or made good by reason.

Besides what hath been said of nature (which reason must always be governed by), I lay it down as a certain truth, that whatever is injurious to the commonwealth is unreasonable, for every man is obliged to consult the interest of that in the first place. I have already observed, that the Roman law or civil law looked upon these conditions in this light, *viz.* that they had a tendency to hinder the increase of

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the number of people, and this is a reason which extends to this and every other kingdom and state ; and reasons which affect the body politic, as they are the most extensive, are the most stringent, so that I think this Court is warranted by nature and reason in construing such condition to be intended only *in terrorem*, where the legacy is not given over.

But it was insisted on by the defendant's counsel, *viz.* that here is a disposition over to the defendant, Dame *Catherine*.

As to this point, the will directs, in case any of the daughters die before the original portions were payable, then the additional portions should not be paid to their executors or administrators, and if the money out of which the additional portions were to be raised should be more than sufficient (these are the words) " for raising the said 2,000*l.* " a-piece for my daughters, I do give the residue thereof to " my dear wife, to whom I give the residue of my personal " estate not hereinbefore bequeathed." Here is nothing given to the wife by the first words but the residue of the money over and above the 2,000*l.* a-piece for the daughters ; indeed, the latter words make Dame *Catherine* general residuary legatee, but that a bequest of the residuum ought not to be construed such a disposition over, as will substantiate the condition and defeat the legacy, will appear by authorities which I shall mention, and is a known rule, where the legacy is not given over, but would sink into the residuum or common mass, or even by express words appointed to go to the residuary legatee (which, by the way, is saying no more than the law says.) In that case I have held (*Paget v. Haywood*, Nov. 15, 1733) and I do hold, that the legacy is not given over so as to effectuate the condition, but it is, notwithstanding, to be intended only *in terrorem* ; however, that is not the present case, for this is plainly a legacy given on condition of marrying with the consent of another, and no disposition over.

As to authorities upon this head, I shall confine myself to such provisions or portions as were not charged upon land, but affected personal estate only, and take notice of the others upon the head of the original portions.

The first case is *Escott v. Escott*, 7th Feb. 1653, named only in the case of *Fry and Porter*, 1 Chan. Ca. 144. ; but I find it in the Register's Book of that year A. fol. 747. 6th February 1653. A man bequeathed to his nephews and nieces 500*l.* a-piece ; to his nephews at twenty-one, and his nieces at twenty-one or marriage : and in case either of his

nephews or nieces should marry before twenty-one, without the consent of their mother and uncle, his or her legacy should be void, and distributed amongst the others.

One of the nephews brought his bill against the mother, executrix of the will, and the uncle, for his legacy; the mother insisted that the plaintiff married without her consent. The uncle averred his consent, the Court decreed the legacy a very strong case against such conditions, for here was a bequest over; and though the uncle averred his consent, the mother denied hers; and the will makes the consent of them both necessary.

The next case is *Bellasis v. Ermine*, adjudged by Lord Chancellor *Clarendon*, assisted by Justice, afterwards Lord Lord Chief Justice *Hyde*, and my Lord Chief Baron *Hale*, Trin. 15 Car. 2., 1 Ch. Ca. 22. A portion of 8,000*l.* was given to the plaintiff's wife, provided she married with the consent of *A.*; and if not, she to have but 100*l.* *per annum*; she married without the consent of *A.* which was pleaded, and the plea overruled. The whole Court declaring this proviso was but *in terrorem*; but if the portion had been limited to another, it had been otherwise; which distinction too is affirmed by my Lord *Nottingham*, 1 Vern. 201.

The next case was upon a deed of trust concerning a sum of money. It is *Sutton v. Jenks*, 2 Chan. Rep. 95, adjudged 25 Car. 2., by my Lord *Nottingham*. This case, so far as concerns the present question, is in the main rightly reported as compared with the Register's Book. 1,500*l.* was to be put out at interest for the benefit of the plaintiff *Anne*, to be paid her at the age of twenty-one or marriage; but if she married without the consent of the father and mother, or one of them, or the survivor, then 500*l.* part of the 1,500*l.* to be paid to such person as the mother by writing under her hand should appoint. The mother by deed poll directed if her daughter married without the consent of her or of her father the defendant, then the 500*l.* to be paid to her and the defendant, or the survivor. The mother died, afterwards the plaintiff *Sutton* married the plaintiff *Anne* in a clandestine manner, without her father's consent, and after he had forbidden her to marry him, on forfeiture of his blessing, and what otherwise she might expect from him. The defendant claimed the 500*l.* Lord *Nottingham*, on hearing the cause, declared the plaintiff could not have the 500*l.*, but the defendant the father was entitled to it, with interest from the

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marriage : Here I observe, that by the power of appointing the 500*l.* in case of marriage without consent, and by the execution of that power, the 500*l.* is given over, so that this precedent is not applicable to the present case.

The next is the case I mentioned before of *Shipton v. Hampson*. According to the Register's Book, the decree is entered as of 28th of April, 1675, Book B. 587.; as far as concerns the present question, the printed book and the Register's Book agree. There a legacy of 2,000*l.* was given by a father to his daughter the plaintiff, on condition she married with consent of the executors ; she married without their consent, notwithstanding which she had a decree for her legacy ; but there indeed the plaintiff had the same sum charged upon land without any condition ; and this she had released at her father's request, he promising to improve it for her, so it became a debt, to the payment of which he could not annex any condition. I mentioned this case therefore only for the sake of making the collection of cases any ways relating to this matter complete.

The next case is *Garrett v. Pritty*, 2 Vern. 293, 4th July 1693. Register's Book A. 821. A man by his will gives to his daughter 3,000*l.* ; but if she should marry without the consent of one *Scriven* before twenty-one, the legacy of 3,000*l.* should cease and be void, and in lieu gives her 500*l.* only, and gives the son the residuum of the estate. The plaintiffs married without the consent of *Scriven*, (it is taken for granted before her age of twenty-one,) and brought their bill for the 3,000*l.*, notwithstanding the clause of restriction, and decreed accordingly, says Mr. *Vernon*, principally because it was not expressly devised over, but to fall into the surplus.

The next case is *Stratton v. Grymes*, 2 Vern. 357., judged by my Lord *Somers*. A freeman of *London* gives two-thirds of his third or legatory part to his daughter ; but if she married without the consent of her mother, then her brother to have 500*l.* of what he had given his daughter : she married without her mother's consent. *Per Cur'*. This is not to be taken as a clause *in terrorem*, but vests an interest in the brother, whom the testator considered as to what provision he was to have by his will, as well as the daughter. I mention this declaration of the Court, because it shews the true reason of the distinction that hath prevailed between such conditional legacies where they are given over, and where they are not.

The next case is *Amos v. Horner*, reported to be Mich.

1699. Abridgment of Cases in Equity, 112. A man bequeathed 100*l.* to his daughter on her day of marriage, on condition she married with the consent of certain persons; and if she married without their consent, then to have 50*l.* only, and gave the residue of his personal estate to the defendants; she married without such consent, and it is said it was held by the *Master of the Rolls*, that this was more than a clause *in terrorem*, and that the devise of the surplus of the personal estate was a devise over; which is contrary to the opinion of the Court as implied in *Bellasis* and *Ermine's* Case, and expressed in *Garrett* and *Pritty*, and contrary to the known rule of the Court; but after all there is no foundation for this report; for there was no resolution in *Amos* and *Horner*; by the Register's Book it appears that the cause was brought on in Michaelmas 1698, and that it was put off for want of parties, and never came on again that I can find.

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The last case I shall mention on this head is *Creagh v. Wilson*, 2 Vern. 572. *John Wilson*, a clergyman, bequeathed 200*l.* to his granddaughter, the plaintiff *Elizabeth*, provided she continued with his executors; but if she should be taken from them by her father (who was a papist) before twenty-one, or in case she should marry against the consent of the executors, he gave her but 10*l.* The plaintiff *Elizabeth*, with the consent of the executors, was placed with a clergyman; after she had been there some time, she had his leave, and the consent of one of the executors, to make a visit to her father, who took that opportunity of marrying her to the plaintiff *Creagh*, a Papist, and gave her himself a portion of 800*l.* The bill was for the legacy, and the *Master of the Rolls*, Sir *J. Trevor*, decreed it with interest and costs. But my Lord *Cowper* reversed the decree, and dismissed the bill as to the 200*l.*, and directed only the 10*l.*; here it was part of the condition that she should not be taken from the executors by her father, which was done; for my Lord *Cowper* declared the taking her away from the clergyman with whom she was placed by the executors, agreeable to the intent of the testator, that she should be bred a Protestant, was a taking her from the executors; and though she had a consent to go to her father, yet no consent that he should marry her, which was the very thing the testator intended to provide against; and it was a marriage against the consent of the executors, where they had not an opportunity before the marriage to declare their dislike, and afterwards

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they dissented ; and here I observe was a total defeating the intention of the testator which was that she should be bred a Protestant, and not marry a Papist, which I conceive would be a good condition annexed to a legacy according to the Ecclesiastical Law, as it is to be taken here since the reformation of religion, so that this resolution doth not contradict former resolutions, nor affect the present case, where the condition is barely to marry with consent of another, and without any particular view or contemplation.

From the view of these cases, I am, in point of authority, well warranted in the opinion, that the legacies given by the will, ought to be decreed out of personal assets, *viz.*, either such as were so at the testator's death, or such as by the will and decree are to be considered as such, I mean the 4,100*l.* Before I enter upon the consideration of the question concerning the original portions, I will, preparatory to it, make an observation upon what I have said, relating to the additional portions, *viz.*, that the construing such conditions annexed to legacies, where they are not given over, to be meant only *in terrorem*, is not founded in the law ; for the Roman or Civil Law made void conditions of this kind in general, whether the legacies were given over or not, as prejudicial to the public ; but the Church of Rome, placing great sanctity in celibacy, the superstitious notions of that Church prevailed over the public spirited notions of the State of Rome ; and that with other errors obtained here, and in consequence such conditions were allowed very probably without any limitation ; but then the spirit or temper of this Court, which moderates the rigour of the law came in, and where such legacies were not given over, set up the notion of their being intended only *in terrorem*. This I mention, because it may be of use in the consideration of the remaining question concerning the original portions, because they arise out of a trust, and all trusts are to be judged and only to be judged by the rules and maxims of a Court of Equity ; and this Court hath taken or used a latitude or liberality in the construction of trusts, and governed itself more by the intention than the letter ; and even in the case of Uses, though they are now legal estates, yet because they were originally equitable interests only, my Lord *Coke* says, Co. Litt. 49*a.*, The intention of the parties works much in the raising and direction of uses ; and in the case of *Sheldon and Dormer*, 2 Vern. 311, my Lord *Somers* says, Courts of Equity have always, in cases of trusts taken the same rule of pursuing

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the intention of the parties as in cases of wills, and that even in limitations of estates, where the letter is to be as strictly pursued as in any case. I observe in the present case we are not upon the construction of a limitation of estate, but the direction of trust-money; and if this Court hath, in the case of money given by a will, and not given over, held the intention of the party in annexing a condition of this sort to be only *in terrorem*, this Court must, if it will be consistent with itself, adjudge the intention of the party in annexing such a condition to a gift of money by a deed to be likewise only *in terrorem*; and therefore I am of opinion the portions provided by the settlement, as well as those by the will are due, and ought to be raised out of the trust term, subjected to the payment of them. I shall not repeat what I have said upon the former head, though all of it, (except so much as relates to legacies as they are distinguished from other provisions, and are *alieni fori*) I say every thing else may be applied to the question concerning the original portions provided by the settlement, and is, I think, a sufficient ground to determine in favour of them, unless this reasoning be controuled by authorities. I shall therefore state the authorities, and it will appear they do not gainsay the opinion I have given, but fall in with it.

Before I go into these authorities, it is fit I should take notice of what was insisted on by the defendant's counsel; *viz.* that the original portions are given over by the settlement, which says, "If any of the daughters die before marriage, without such consent, then the sum intended for her portion shall cease, and the premises be exonerated; and if raised, or so far as it shall be raised, shall be payable to such person or persons to whom the remainder or reversion should for the time being belong."

I think there is no ground from this clause to say the portions are given over. Whatever this disposition is, it is not to take place upon the breach of the condition, that is, marrying without consent, but upon the daughter's dying before marriage with such consent; so that it is taken for granted, if she marries at all she will marry with consent; and, therefore, this seems to be no more than to provide for the case of his daughter's dying unmarried. If it was intended otherwise, and the disposition over was to take place upon the daughter's death, if she had before married without consent, what is to become of the profits raised before the marriage, during the intermediate time between the marriage and the daugh-

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ter's death ; to whom shall they be paid ? It might happen, the next in remainder at her marriage might not be next in remainder at her death. This uncertainty shews Sir *Thomas Aston* had no particular person in view to take these profits, which is necessary to make it such a disposition over as will effectuate the condition ; besides, being fruits fallen, they could no otherwise be disposed of than as are to the advantage of the inheritance, which like a *legacy falling* into the *residuum* will not be taken as a disposition over.

But after all, could any profits be received by the trustees ? indeed, they might in point of law have entered immediately, as soon as the term commenced ; but then, I say, they ought not to have entered according to the known rule of this Court, for the portions not being then payable, and the trustees having a power to raise the portions in a gross sum when they became due, the raising them before that time would be injurious to the owners of the land into which it would sink, if it never became payable ; and upon a proper bill for that purpose, this Court would enjoin the trustees, and if the trustees did not or could not enter, then this clause says, the sum intended for the portion shall cease, and the premises be exonerated ; and though it goes on and says, what shall become of the portion if raised, or so far as it shall be raised ; yet this is a needless caution, because the portions ought not to be raised, or so much as begin to be raised, till they are payable, and consequently here is nothing that is or can be given over.

Thus it stands upon the settlement, the codicil of Sir *Thomas Aston* makes no alteration as to this matter, for though it appoints the profits of the *Cheshire* estate not in jointure till his son attains the age of twenty-five, to be applied first for raising a maintenance for his son, and the residue towards the portion of his daughters, yet this is a new trust ; and the cases of the daughters dying before marriage with consent, as it is in the settlement, is not put ; but on the contrary the codicils suppose the portions will be payable, and expressly directs the residue of the profits to be applied for and towards raising the portions of his daughters.

I shall now, taking it for granted this is no disposition over, proceed to the stating the authorities, which any way relate to the portions provided by the settlement.

The case of *Fry v. Porter*, so often mentioned in reports of law and equity, is not an authority applicable to the pre-

sent case, for though there was a gift on a condition of this kind, yet it was of a legal estate ; besides, there was a devise over, and there being no equitable circumstances to vary the case from what it was at law, this Court had not the proper cognizance, but here we are in the case of an equitable interest, properly and only cognizable in a court of equity. I shall now consider such cases, either by way of trust or charge upon land.

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The first case I find is *Farmer v. Compton*, 1 Ch. Rep. 1. Register's Book of 1636, A. fol. 1088. There a portion of 4,000*l.* was to be raised out of lands, payable to the defendant's daughter at twenty-one, or when with the consent of her father she should be married ; and if she died before such age or marriage, the portion to go over to his other children. A marriage between the plaintiff and defendant's daughter, with the consent of the fathers on both sides was agreed, and directions given for a settlement, but before it was executed the young couple married without the knowledge of either of the fathers, and they being ignorant of it the settlement was executed ; afterwards the father of the daughter was acquainted with the marriage, and part of the portion was paid. My Lord Keeper *Coventry* who heard the cause, sent this case to the Judges of *Serjeant's Inn*, in *Fleet Street*, who certified their opinion that this marriage ought in justice and equity to be esteemed a marriage with the consent of the father, of which opinion likewise was my *Lord Keeper*. Here was a marriage as to the time without consent, and to be sure without the good liking of the father, though the consent to the treaty before, and his approbation after the marriage, and no disagreement in the mean time, made it in equity a marriage with his consent.

The next case is *Vintner v. Picks*, 1 Ch. Rep. 121. Register's Book of 1638, B. 443.

Richard Picks by his will, gives to plaintiff, *Eleanor* his daughter, 200*l.*, payable at twenty-one or marriage, and by a marginal note to his will adds 200*l.* more, with this clause, "if she behaves herself dutiful to her mother." This the plaintiff *Eleanor* had not, having married the other plaintiff without the consent and contrary to the will and liking of her mother. Upon hearing the cause, on the 24th April, 1638, by my Lord Keeper *Coventry*, it was referred to Mr. Justice *Croke* and Mr. Justice *Berkley*, and two Masters in Chancery, (who in those days were commonly civilians,) to consider how far this marriage was a breach of the condi-

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tion, and certify whether in their opinion these sums did belong to the plaintiffs or not. They reported their opinion that the 200*l.* in the margin, as well as the 200*l.* in the body of the will, did belong to the plaintiff *Eleanor*, notwithstanding the marriage.

The 21st of May following, the cause came again to be heard upon this report of the Judges and Masters, when the plaintiffs' counsel prayed a commission to examine the value of the lands charged with the portion, and the profit received by the defendants, and whether there were assets in the defendants' hands to pay the portion, which was ordered *nisi*. The 26th of June following, the plaintiffs moved to make the last order absolute, and that the 400*l.* might be paid, then the defendant's counsel consented a commission should issue as desired, which was ordered accordingly, and the commissioners were to treat between the parties, being mother and son, and make an end if they could: this is what appears in the Register's Book. It is to be observed, that the plaintiff's marriage, without the consent of her mother, is taken to be an undutiful behaviour, as no doubt it was, and a breach of the condition annexed to the gift of the 200*l.* by the marginal note, and yet it was decreed.

The next case is *Norwood and Norwood*, 1 Ch. Rep. 121, and the same Register's Book, B. 560 and 580. A portion was charged on lands payable at twenty-one or marriage, so as the plaintiff married with the assent of her mother and other trustees. The plaintiff attained her age of twenty-one and brought her bill; the defendant admitted the charge, but alleged the plaintiff was about to marry without the consent of her mother and trustees: the portion was decreed with damages, that is, interest from the age of twenty-one, when to be sure the portion vested and became payable.

The next case is *Fleming v. Waldgrave*, 1 Ch. Cas. 58, Register's Book, 16 Car. 2. fol. 107. Decreed by Lord *Clarendon*, assisted by Sir *Harbottle Grimstone*, Master of the Rolls. *Francis Copledike* granted a term of ninety-nine years in land, to Sir *Edward Waldgrave* and his lady, for securing 700*l.* for the benefit of *Thomasin Copledike* his sister, in case she did not marry contrary to the consent of Sir *Edward Waldgrave* and his lady; but if she married contrary to their liking, then for the benefit of such to whom Sir *Edward* or his lady, or the survivor should appoint, and in default of appointment, to Sir *Edward* and his lady, or survivor. *Thomasin* married without their consent, and

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afterwards died without issue. Sir *Edward* died without making any appointment, and his lady made a deed of gift to one *Small*, of all her goods and chattels, and died ; and administration to her and also to *Thomasin* was granted to *Francis Copledike*, who created the term, and he assigned it to a trustee for the benefit of himself, his wife and children. The question was, to whom the interest of the term did belong. The Court declared it was not in the power of Sir *Edward Waldgrave* and his lady to dispose of the term otherwise than for the benefit of *Thomasin*, if she had lived ; and *Francis Copledike* having taken administration to Lady *Waldgrave*, and to her, was entitled to it, and it was decreed accordingly. Upon this case I observe, that it was a trust of land, and a disposition over of the money, and though the condition is marrying contrary to the consent of Sir *Edward Waldgrave* and his lady, not without their consent, yet that distinction is pretty nice ; however, if it is to be admitted, yet thus much I conceive the condition implies, that the marriage should either be consented to before, or approved of afterwards, which it doth not appear to be, either by Sir *Edward* or his lady ; and as to my lady the contrary appears by her deed of gift of all her goods and chattels, which certainly included this term ; besides, the Court declared it was not in the power of her and her husband to dispose of it otherwise than for the benefit of *Thomasin*, and though the administration to Lady *Waldgrave*, as well as to *Thomasin*, is mentioned in the decree, yet that must be in respect to the legal interest of the term, which was in her but for the benefit of *Thomasin*.

The next case is *Needham v. Vernon*, Reports in Lord *Nottingham's* time, 62. Register's Book of 1674, B. 382. A term was created in trust, to employ the rents and profits for raising 1,500*l.* a-piece portions for the plaintiffs, to be paid at their respective marriages, with the consent of the trustees, and if either married without, to have but 100*l.*, and the remainder was given over. The portions were raised and admitted to be vested, the plaintiffs offering to give security to indemnify the trustees against the defendants, to whom the portions were limited over ; the portions were decreed to the plaintiffs.

There is a case so like this, that I shall mention it out of time, and only name it : it is a case in that family which is now before the Court, *Aston v. Aston*, 2 Vern. 452, and

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reported in precedents in Chancery, 226, by a wrong name, viz. *Ashton v. Ashton*.

The next case is *Bostock v. Ireton*, Reports in Lord Nottingham's time, 234. Register's Book, 1675, lib. 4. fo. 131. *Thomas Bostock*, the plaintiff's father, having issue only the plaintiff and defendant *Mary*, made his will, and bequeathed to the defendant, *Mary*, 2,700*l.*, secured by a mortgage, upon condition she married with the consent of the executors, and in case she married without such consent, then he bequeathed 850*l.* part of the money to the plaintiff. The plaintiff brought his bill for 850*l.*, insisting the defendants, *Ireton* and his wife, married without the consent of the executors, or if they did give their consent, it was upon conditions which were never performed. Upon hearing the proofs read, the Court declared the defendants, the executors had consented to the marriage upon *Ireton* and his father making a settlement of 500*l. per annum*, and the marriage being had, and *Ireton* and his father being ready, on the receipt of the portion, to make such settlement, the executors could not now retract their consent, and ordered the bill to be dismissed, but the bill being also to have a settlement made according to the proposals, and the defendant *Ireton* and his father being present in Court, and declaring they were ready to make the same, it is ordered, the 2,700*l.* be paid to *Ireton*, upon his and his father's entering into recognizances in 6,000*l.* penalty to make such settlement, to be allowed by a Master, and to abide the further order of the Court, and the trustees to have costs out of the estate.

Here was a disposition of a sum of money charged upon land, and the condition annexed to that disposition under favour not performed, the consent of the executors to the marriage was conditional, and though they might give their consent conditionally, yet it must be on a condition to be performed before the marriage, for otherwise it might never be performed, and then the executors' consent would be null and void, and consequently it would be a marriage without consent, therefore, the consent of the executors must be understood to be, as I doubt not but it was, upon making a settlement before the marriage, which was not done; however, the Court made good the consent, by matter *ex post facto*, agreeable to the genius of this Court, which qualifies the rigour of the law; and the Court at the same time made

provision for the wife and children, as by the way it can do in the present case.

The next case is the *Earl of Salisbury v. Bennett*, First reported in 2 Vent. 365, Register's Book, 1691, A. 609.

The case was this, *Simon Bennett* having two daughters, the plaintiff and defendant, by his will gave them 20,000*l.* a-piece, to be paid at twenty-five or marriage, which should first happen, so as such marriages were not before sixteen, and were with the consent of his wife and his cousin *Lee*, his executors, or one of them, and if either of his daughters married otherwise, then to have only 10,000*l.*, and gave the residue of his personal estate to his children, and by deed charges his real estate in aid of his personal. The father of the plaintiff, the Earl, and Mr. *Bennett*, treated of a marriage between the plaintiffs, but the Countess then not being twelve years old, the marriage was agreed to be respited, and before the marriage both the fathers died. Afterwards, plaintiff married with the consent of the executors, but before the Countess was sixteen; on a bill brought by the plaintiff, that cause came on to be heard before Lord Keeper *North*, Pasch. 36 Car. 2. It was urged by the plaintiff's counsel, that the marriage being with consent, it might be at any age. But, says Mr. Justice *Ventris*, my Lord Keeper was of opinion, both parts of the condition must be performed. Thus far that book. By 2 Vern. 223. and Skyn. 285. and Register's Book of 1691, A. 609, it appears, the plaintiffs had before libelled against the executors in the Arches, and were stayed by injunction, and the cause brought to hearing on bill and answer, the plaintiff, the Earl, then an infant. My Lord *North* declared the plaintiff's demand being a legacy, another Court was as proper, upon which intimation, further proceedings were had, during the Earl's minority, in the Arches, but he being come of age, and 10,000*l.* being paid, brought a new bill for the remaining 10,000*l.*, or else that the injunction might be dissolved. This cause was brought to hearing before the Lords Commissioners *Rawlinson* and *Hutchins*, May 1, 1691; the Court declared that upon consideration of the words of the will, and all the circumstances of this case, they were fully satisfied the plaintiff, the Earl, ought to be relieved as to the remaining 10,000*l.*, notwithstanding any construction that can be made on the words of the will, to make the plaintiff's, Lady *Salisbury*'s, marriage before her age of sixteen years, amount to a forfeiture, and declared the 10,000*l.*

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ought to be a charge on the personal estate, and if that was not sufficient, then the real estate to be charged therewith.

Here I observe the portion was charged upon land, and the condition not performed, for it was part of the condition that the marriage should not be till 16, nor I conceive was it dispensed with by the father, for though he treated of the marriage, yet that was before the marriageable age, and he might have altered his mind, and so might his daughter; besides, he might trust himself with marrying her before sixteen, but not any body else.

The next case is *Ventris v. Glydd*, a case I had some memory of, and I take it out of the Register's Book, 1694, B. 235. Sir *Nicholas Sloughton* having a son and four daughters, devised his real estate to his executors in trust to raise 600*l.* a-piece for the portions of his daughters, upon condition they married with the consent of his two sisters, in writing, under their hands and seals; and in case any of his daughters should marry without such consent, or die before such marriage, their part to go to the surviving daughters who should marry with such consent; and if they all died unmarried, or married without such consent, then to his son *Lawrence*, and requested him to make up his sister's portions 800*l.* a-piece, if they married with such consent. Sir *Nicholas* died. The son secured 200*l.* a-piece more to his sisters, on the condition in his father's will, and died. The inheritance descended to his sisters. The plaintiff *Frances* married the plaintiff *Ventris*, who made a suitable settlement, and before marriage applied to both the aunts, and obtained the consent of one, but not of the other, the defendant *Glydd*; who said, by her answer, she was not satisfied that the plaintiff's estate was not encumbered, and thought it too small, and desired time to enquire, and that he would desist in the mean time, instead of which they married immediately. My Lord *Somers*, who heard the cause, declared, he saw no ground for the plaintiff *Frances* forfeiting her portion by this marriage, and decreed according, and did not think fit to give costs to either side, the surviving trustee, the defendant *Glydd* having not proceeded well in the matter; by the depositions, all the misbehaviour of the trustee, whose consent as well as the other's was requisite, was her not consenting to the match, which was a reasonable one, though she had a year's time to enquire into the plaintiff's, the husband's, circumstances

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The next case is my Lord *Falkland* and *Bertie*, 2 Vent. 333. Mr. *Carey* devised lands to trustees in trust for his niece and heir at law, Mrs. *Willoughby*, for life, in case she should be married to the Lord *Guildford* within three years after his death, and then to the first and other sons of my Lord *Guildford* by her in tail, and in default of such issue, or if the marriage did not take effect in three years, then to my Lord *Falkland* for life, and to his first and other sons in tail, remainder to his own right heirs.

The marriage did not take effect, and after the three years she married Mr. *Bertie*. Overtures had been made to my Lord *Guildford's* guardians, and applications to the Court, and an order from my Lord Chief Justice *Jefferies*, that she should not marry my Lord *Guildford* without a jointure, and she was an infant. My Lord *Somers*, assisted by the two Chief Justices, *Holt* and *Treby*, decreed the trustees to convey to the plaintiff, Lord *Falkland*; but upon an appeal to the House of Lords, Mr. *Vernon* says it was ended by compromise.

I do not think this case applicable to the present, though it was mentioned, nor do I think it will be a precedent in any case, because of the particularity of it; I am sure it is of no authority against relief in the present case, amongst other reasons for this, that there was a condition of marrying a particular person, which is undoubtedly a good condition by our law, and even by the civil law, Swinb. 245.

The last case in this Court which I shall mention, is *King v. Withers*, Pre. in Ch. 348, and Reports of Cases in Equity, in Chancery and Exchequer, 26. The defendant's father devised to the defendant lands, charged with 2,500*l.* to his daughter, at her age of twenty-one or marriage, which should first happen; provided if she married in the lifetime of her mother without her consent, then 500*l.*, part of the 2,500*l.*, should cease, and be applied towards payment of his debts, which he charged on other lands, and appointed his wife guardian of his daughter and executrix; the daughter attains her age of twenty-one, and without the consent of her mother married.

Her husband and she brought their bill for the 2,500*l.* My Lord *Harcourt* decreed the whole 2,500*l.*, for that she attaining the age of twenty-one, her title to the whole was complete, and not to be impeached afterwards by marrying without her mother's consent, notwithstanding it is expressed, that if she married in the lifetime of her mother

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without her consent, the 500*l.* to cease, and be applied to the payment of debts in ease of the land, which under favour is a devise over, let the debts on the estate devised be what they will, notwithstanding the contrary is said in that case, and though the 500*l.*, as well as the 2,000*l.*, was vested at twenty-one, yet the breach of the condition might fetch it back again, as in the cases of *Needham* and *Vernon*, and *Aston* and *Aston*, I mentioned before. In this case my Lord said, the portion was to be raised out of land, and therefore must have the same consideration as a devise of the land. I observe this *dictum* was not in support of the judgment, but rather the contrary, nor can I agree to it; viz. that trust money out of land is to have the same consideration as land itself, for the reasons and authorities I have before given and taken notice of.

These are all the authorities in this Court of this kind that I can find, but there is another, and a considerable one, or rather stronger against relief than the present case, it was in the Duchy Court, before a Chancellor learned in the law, Mr. *Lechmere*, afterwards Lord *Lechmere*, and two Judges, my Lord *King*, afterwards Lord Chancellor, and Mr. *J. Dormer*; it is the case of *Semphill v. Baily*, Pre. in Ch. 562. I have had the Register's Book searched, and there is no material variance from the report. *Nathaniel Gaskell* had issue three daughters; the plaintiff *Sarah* was the eldest. An amour, says the book, was carried on between her and the other plaintiff in the father's lifetime, which he greatly disliked, and declared if his daughter married him he would never give her a groat, and makes his will, and devises his real and personal estate to his executors to the following uses: viz. if his daughter the plaintiff married with the consent of his executors, then he devises to her 1,000*l.*, to be paid at twenty-one or marriage, which should first happen, and devises particular lands to her and her issue in strict settlement, with remainder over to his other daughters; and after providing for his other daughters, pretty much though not altogether in the same manner, he goes on and says, if any of his daughters die without issue, then that child's part to go to the survivor, and gives the overplus of his real and personal estate to be equally divided amongst his three daughters.

After his death, the plaintiff, the husband, renewed his addresses to the other plaintiff; the executors in writing expressed their dislike, and gave her notice of her father's

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will, and the danger of forfeiting her portion, and that they could not give their consent, because they knew it was a match her father disliked; notwithstanding all this, she being under twenty-one, married the other plaintiff: they brought their bill for the 1,000*l.* portion. Upon hearing the cause, the Chancellor of the Duchy, and my Lord *King* were of opinion, (Justice *Dormer* dissenting,) that the plaintiffs were entitled to the 1,000*l.*, and the executors were decreed to pay it with interest out of the personal, and rents and profits of the real, estate; but if that not sufficient, the plaintiffs were at liberty to apply for further order, that is to be sure for a sale, and the executors to have their costs, but the other defendants, the sisters, to pay costs, which shews the Court thought it a strong case for relief; notwithstanding here was a marriage expressly contrary to the father's good liking, and that which seems to have occasioned the annexing the condition to the portion by his will, and which was a condition precedent. The reasons for this decree are reported very fully, some of them are taken from the inaccuracy and particular wording of the will, which seems to be thrown in to make weight; but the Court went mainly upon the general reasons of these cases, for the book says, these clauses in restraint of marriage have never been taken favourably, that if there be no devise over, as there was not here, these devises have been held to be only *in terrorem*; that though lawyers know it would be no forfeiture, yet the parties themselves might not be so learned, and therefore it would be some terror.

It is observable, that notwithstanding this was a sum of money charged upon land as well as a legacy, and accordingly decreed, yet the condition was construed to be only *in terrorem*, and so was the condition annexed to a devise not of money out of land but of land itself; held by Sir *Harbottle Grimstone* in the case of *Fry and Porter*, 1 Ch. Cas. 140. Though indeed, for the reasons I mentioned before, this decree was reversed.

And now after these cases I may very well assert, there is no foundation in authority any more than in reason for a distinction between conditions in restraint of marriage annexed to money given out of land, and such conditions annexed to money given out of personal estate, but that in both cases they are to be taken as intended only *in terrorem*. They intrench upon the freedom of choice, which is the foundation of the marriage contract, and the happiness

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expected from it ; they are injurious to the commonwealth, and the taking them strictly or rigorously is putting a harsh and unreasonable construction upon them, and such as is not consistent with the natural affection of parents to their children, upon whom only it may happen the penalty would light, as it would in the case of one of these ladies, Mrs. Clutton, whose husband it seems is dead since the last hearing.

I cannot pronounce the decree without observing, that this way of arguing and determining may be misconstrued and thought to loosen the bands of filial duty ; far be that from me. It is both a moral and positive duty. Parental authority is antecedent to all political societies, but then it is not absolute or unlimited ; let us examine then how far the parental authority extends in relation to the present question.

In children's disposing of themselves in marriage, undoubtedly they ought to ask counsel or advice of their parents if they are living, or if dead, of those they appoint for that purpose, and such advice ought to have great weight with every child. If it hath not, I will say as *Bracton* doth in another case, *Deum expectet ultorem* ; but that children ought to be absolutely determined in their marriage by the will or consent of parents, much less of others of their appointment, or else not to marry at all, that is what I cannot think for the reasons I have mentioned.

This distinction between consulting and advising with parents about marriage, and being absolutely determined by them is not out of my own head, I take it from the civil law, which allows the former as an obligatory condition to a legacy, but disallows the latter, *Swinb.* 243, 245.

And after all this middle way between rigorously imposing upon children, and leaving them absolutely to themselves, might answer the end of parents better, and prevent many unhappy marriages ; for he must know little of the world that doth not know, that the estate or fortune of the person proposed is too often the sole motive of parents or others consenting to the marriage, which then proves as unfortunate as it is disagreeable ; and I doubt those whose consent is made necessary, seldom think themselves justified if they give it from any consideration, at least think *quærenda pecunia primum est virtus post nummos*. But however this may be, I must take things as I find them in the present case, and upon the whole, I think the portions by the will are due

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by the rule of the ecclesiastical law; the portions, by the settlement by the rule of equity; both of them affirmed by the authorities in this Court, together with an additional one which I have mentioned, and not one authority to the contrary; I must therefore decree for the plaintiffs.

His Honour declared it was his opinion, that the plaintiffs were entitled to their original portions provided for them by the said settlement, and also to the additional portions given to them by Sir *Thomas Aston's* will.

From this order of the *Master of the Rolls*, the defendants, Lady *Aston* and Sir *Thomas Aston*, presented a petition of appeal to the *Lord Chancellor*, which came on to be heard on the 29th of April, 1737, when the *Attorney-General*, Mr. *Browne*, Mr. *Wilbraham*, and Mr. *Legg* were heard for the plaintiffs, and Mr. *Pauncefort*, Mr. *Hollings*, Mr. *Fazakerley*, and Mr. *Murray*, for the defendants.

The *Lord Chancellor*, thinking this a case of great importance and difficulty, directed a second argument, which accordingly came on to be heard on the 21st of November, 1737, before the *Lord Chancellor*, assisted by Lord Chief Justice *Lee*, Lord Chief Justice *Willes*, and Mr. Justice *Comyns*, and was argued by Mr. *Attorney-General*, Dr. *Strahan*, and Mr. *Browne*, for the plaintiffs, and Dr. *Andrews*, Mr. *Hollings*, and Mr. *Fazakerley*, for the defendants.

Mr. *Attorney-General* and Mr. *Browne*.—The questions arise upon the portions given by the settlement, and by the will; first, as to the portion given by the will. It is to be considered whether the father really intended that the consent of Lady *Aston* to the marriage of his daughter should be a necessary qualification to entitle them to their portions, and if so, whether that be an intention to which this Court will give effect. As to the intention, it is impossible that the testator should have intended to refer to the discretion or caprice, not of his wife or trustees, but of the executors, administrators, or assigns of such trustees. The question is whether his daughters should have any or no portion, or whether they should marry or not, or whom they should marry. We do not complain of the wholesome exercise of parental authority, but of the delegation of it to strangers throughout the whole of the children's lives. If the strict words are to be adhered to, a daughter who had married with the testator's consent in his lifetime, would not have been entitled to any legacy, nor could any of the daughters,

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if Lady *Aston* had become *non compos*. The object of the testator was to make a provision for his daughters upon marriage simply, for he directs that the term shall cease upon his daughters dying without marriage, adding nothing as to consent. The condition as to marriage is not of the substance of the portion, but is only a circumstance superadded to the time of payment; but if it was the testator's intention to impose this restriction with all the strictness contended for, then we insist that the testator's intention must be tempered by the reason and policy of the law, and that the restriction being illegal, must be rejected as void, and that the bequest will therefore be to the daughters when and as soon as they shall be married.

The civil law holds this restriction upon marriage to be illegal, Swinb. part 4. C. 12. Godolph. Orph. Leg. 380. Our law has adopted that rule, except in cases where the legacy is given over, in all other cases, it considers the restrictions as *in terrorem* only, *Jervois v. Duke*, 1 Vern. 20. *Bellasis v. Ermine*, 1 Ch. Ca. 22. *Pigot's case*, Moore 857. *Garrett v. Pritty*, 2 Vern. 293. *Needham v. Vernon*, Rep. in Ch. 62. The Court will not give effect to such a restriction, unless it be confined to a particular person or time, or unless there be an express disposition over. It will be contended, on the other side, 1st, that the marriage with consent is a condition precedent; 2d, That the legacy is in fact given over; and 3d, That it is to be raised out of land. As to the first, the civil law makes no distinction between conditions precedent and subsequent; in *Larder v. Abingdon*, 28 June, 1731, the *Master of the Rolls* held that there was no difference between a condition precedent and subsequent. *Semphill v. Baily*, Pre. in Ch. 562, was a case of a condition precedent, but if this be a condition at all, it is a condition subsequent, for it is annexed to the time of payment, which does not prevent the legacy from vesting. As to the second objection, there is no disposition over in this case, for these legacies are directed to fall into the residue, *Paget v. Haywood*, Nov. 12, 1733, and that not upon marriage without consent, but upon death without marriage with consent. As to the third objection, these legacies cannot be considered as given out of land, because the land is directed to be sold, and the money to be produced is directed to be paid to the executors to increase the general fund of the personal estate. As to the original portions under the settlement, it will be objected, that being to be raised out of

trust term of lands, they must be regulated according to the doctrines of the common law; but we insist that this restriction upon marriage is against the public good, and is therefore void, whether applied to portions or legacies. Portions upon settlements are always considered in the most favourable light, and this is not a legal question concerning estates in land, but a question relative to a trust term, which is peculiarly cognizable in a Court of Equity, and which ought therefore to be decided by the same principle which the Court has adopted with respect to legacies. In the case of *Fleming v. Waldgrave*, Cases in Chancery, 58, the portion was secured upon a lease, and in *Bostock v. Ireton*, upon a mortgage. In cases where these restrictions have been admitted the Court has adopted the greatest latitude of construction, 1 Mod. 310. *Earl of Salisbury v. Bennett*, 2 Vern. 223. The settlement provides, that upon the death of a daughter before marriage with consent, so much of the portion as may have been raised shall be paid to those in remainder, which assumes, that a marriage with consent was not intended necessarily to precede the raising of the portions; independent of all other objections, the restriction in this case is void, because the forfeiture can only be saved by the consent of that person who is to benefit by its being incurred.

Doctor Strahan on the same side.

I shall state the rules of the civil law, and consider it first generally as a provision for daughters.

The civil law has apportioned a father's estate, which it is not in his power to take away; if he should give it away, he must assign some satisfactory reason; he could not clog it, or put any restraint upon marriage.

The writ, *de rationabili parte bonorum*, shews the civil law has been received and countenanced in England.

With regard to marriage portions, the civil law has a particular law for that purpose, Cod. lib. 5. tit. 11. *De dotis promissione et nuda pollicitatione*, lex 7. Dig. lib. 23. 2 Tit. *de ritu nuptiarum*, lex 19. *De patribus cogendis in matrimonium collocare*; *Qui liberos, quos habent in potestate, injuria prohibuerint ducere uxores, vel nubere, vel qui dotem dare non volunt*; *ex constitutione divorum Severi et Antonini proconsules, præsidesque, provinciarum coguntur in matrimonium collocare et dotare*.

If parents had been allowed to annex conditions to portions, it might, perhaps, have been an unreasonable one,

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and have frustrated the design of portions. This was contrary to the policy of the Republic of Rome, the *jus trium liberorum*.

Marriages ought to be free, *libera debent esse matrimonia*, and it is a general rule in the civil law, where a condition is annexed to a legacy by way of total prohibition of marriage, that it is absolutely void.

Jacobus Gothofrædus de fontibus juris civilis, p. 291., mentions the *Julian law*, *de patriâ potestate* in the time of *Augustus*, that if any person adds a restraint to marriage let them be free from the condition; they endeavoured then to find out conditions which would not in direct words restrain marriage, but in the implication would have the same effect, by making the consent of a third person the condition of marrying. This was declared to be eluding the design of the *Julian law*, *Dig. lib. 35. 1. Tit. De conditionibus et demonstrationibus et causis et modis eorum quæ in testamento scribuntur. Lex 72; Si arbitratus Titii Scia nupserit, meus hæres ei fundum dato; vivo Titio, etiam sine arbitrio Titii eam nubentem legatum accipere, respondendum est: eamque legis sententiam videri, ne quod omnino nuptiis impedimentum inferatur. &c.* This is *Papinian's* determination, who was looked upon to be the brightest of all the *Roman* lawyers; and *Cujacius*, in his comment upon this very law, says, his authority is of great weight, and has such regard paid to it in our Court, that conditions restraining marriage are held by us, upon his authority, to be absolutely void. *Mantica, lib. 11. n. 8. Grassius, lib. 1. n. 9. Covarruvius, n. 3.* takes a difference between marriages with the consent, and with the advice and counsel of another. *Sanchez de sanct. matrimon. sacramento disputat. 34. n. 19. Non tantum conditio non ineundi matrimonium, rejicitur, legato, sed etiam conditio ineundi arbitratus vel consensu tertii, et ratio est, quia qui tenetur consensum vel licentiam alieni petere, tenetur sequi, atque illa matrimonii libertas impeditur.*

Swinburne, part. the 4th, sec. 12., lays it down as a general rule, that all conditions against marriage are unlawful, contrary to the procreation of children, repugnant to the law of nature, and detrimental to the commonwealth.

In the present case *Lady Aston* will have the benefit, who is the person to refuse. *Dig. lib. 30. tit. 1., de legatis et fidei commissis, lex. 43. parag. 2. Legatum in aliend voluntate poni potest, in hæredis non potest.* The heir in this case is to have the benefit also by refusal; and therefore *nunquam*

presumeretur velle obligari, and ought not to receive any countenance.

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The emperor *Justinian*, *Cod. lib. 6. tit. 43. Communia de legatis : et fidei commissis : et de in rem missione tollenda ;* saith, *Rectius igitur esse censemus in rem quidem missionem penitus aboleri : omnibus vera tam legatariis, quam fidei commissariis unam naturam imponere, et non solum personalem actionem præstare, sed et in rem, quatenus eis liceat easdem res sive per quodcunque genus legati, sive per fideicommissum fuerint derelictæ, vindicare in rem actione instituenda.*

Where a condition is null and void, the question will be then, whether any devise over or limitation will be good ?

When the validity of the condition which is annexed to the legacy is taken off, it becomes absolute, and no devise over can affect it, *Dig. lib. 35. tit. 1. De condit. et demonstrat. lex 22.,* *Quotiens sub conditione mulieri legatur, si non nupserit, et ejusdem fideicommissum sit, ut Titio restituat, si nubat : commodè statuitur et si nupserit, legatum eam petere posse et non esse cogendam fideicommissum præstare,* the condition being void in law, the legacy is discharged of it.

Supposing such consent should be necessary, yet it must be a reasonable objection to the marriage, that is intended by this condition. Here the plaintiff Mr. *Hervey* has 300*l. per annum*, in possession, and as much in reversion, and was ready and able to make a proper settlement ; and therefore there could be no reasonable grounds for Lady *Aston's* refusal.

Doctor *Andrews* for the defendants.

Deeds are undoubtedly of a stricter nature than a will ; and as the will in the present case plainly refers to a deed, it must be construed with the same strictness as a deed, this is not properly a condition, but a description of the person who is to take.

It is a legacy uncertain, but to be made certain by a fact ; for it is not daughters by name, but to a daughter only who marries with the consent of the mother, and nobody can take but those who bring themselves within the description. I do maintain that this is a legacy which has never vested, because the condition on which it is given by the testator has not been performed, and, according to the law of the twelve tables, *voluntas testatoris in testamento totum facit*, *Dig. lib. 35. tit. 1. lex. 75. lib. 36. tit. 2. lex. 21, 22. :* and though a prohibition of marriage hath not been allowed, yet the civil law permits a restraint upon it, *Cod. lib. 5. tit. 4. lex. 1.*

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Cum de nuptiis puella quæritur, nec inter tutorem et matrem et propinquos de eligendo futuro marito concenit ; arbitrium præsidis provinciæ necessarium est. That part of the condition which requires the marriage to be with the consent of the mother is not void. The law of the twelve tables is positive. Afterwards came the *Lex Julia et Poppæa*. Restraints upon marriage were allowed, prohibitions disallowed. By the civil law a gift of a share to a wife so long as she continued a widow and in case of her marriage *liber esto* was good.

That law permitted the father to exercise a greater power in restraint of the marriage of his wife or child than a stranger, Dig. lib. 33. tit. 4. lex. 11. Cod. lib. 5. lex. 1.

The civil law does not take place even in our ecclesiastical courts except where it is founded upon the *jus gentium*, and that only because it has been adopted, and not as the positive law of the Romans. *Grotius* lays it down, that, after the death of the father, the mother is entitled to the same obedience from the children as the father, founded upon the fifth commandment.

The *jus trium liberorum* is not in force with us ; if a *Roman* had three children, and not able to maintain them, the commonwealth maintained them ; but the public here takes no notice, the parishes must support them. In the *Roman* law children were entitled to the *legitima pars* to which the father could not annex any condition ; but to what was over and above that part he might. By our law a man has an absolute power to dispose of his estate, and if he marries, though he has lawful children, yet he may dispose of his estate to the illegitimate issue, in prejudice to the legitimate. By the *Roman* law the portion was the woman's distinct property : here it belongs to the husband, and here it should be considered as if the father had said, I give 2,000*l.* to such a man as shall marry my daughter with the consent of the mother.

Mr. *Hollings* and Mr. *Fazakerley* on the same side.

There can be no question as to the testator's intention ; he contemplated the event of his daughters' contracting improvident matches, and in that case has directed that they should receive certain annuities which their husbands could not waste, and has given them portions in the event only of their marrying prudently ; marriage without consent is as no marriage at all with respect to their portions, but the daughters continue to be entitled to their annuities as if no

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marriage had taken place ; in this disposition there is nothing irrational ; but the father had power to give any thing or nothing, and to make the vesting of what he gave depend upon what event he thought proper. The deeds and wills of individuals are private laws.

The testator's intention was not only consistent with, but in furtherance of the object of the law which has laboured to protect children against the effects of imprudent marriages, 20 Hen. 3. c. 6. 3 Edw. 1. c. 22. 4 & 5 Ph. & M. c. 8. 12 Car. 2. c. 24.

So the Custom of *London* recognizes the propriety of requiring consent to marriages. The rules of the civil law are of no authority upon the present question, because, although Courts of Equity have adopted the principles of that law with respect to personal legacies to avoid any contradictory judgments between concurrent jurisdictions, they have been careful to avoid the introduction of those rules with respect to legacies arising out of land.

The provisions as to marriage do not amount to a condition, and do not impose any penalty ; nothing is given till marriage with consent ; that is the contingency upon which alone the portions and legacies are payable, and that contingency has not happened. They are not given to daughters or a daughter when married, but to daughters married with consent ; the plaintiffs do not bring themselves within that description ; they come too soon ; the time of payment is not arrived ; a legacy upon marriage with a particular person, or with a person of a particular name is not payable, unless such marriage takes effect. *Lord Falkland v. Bertie*, 2 Vern. 333.

It is said that this provision applies only to the time of payments, but in portions or legacies to be raised out of lands, the time of vesting and of payment is the same. *Poulet v. Poulet*, 1 Vern. 204. *Yates v. Phettiplace*, 2 Vern. 416. *Smith v. Smith*, 2 Vern. 92. *Tournay v. Tournay*, Prec. Ch. 290. A portion charged on land is to be considered as land ; every trust term is part of the inheritance ; no case has been cited in which portions under the present circumstances have been raised out of land ; in *Fleming v. Waldgrave*, 1 Ch. Ca. 58. it is probable that the money was secured upon mortgage, which would be mere personal estate. There can be no doubt of such provision being legal at common law, by which the present case must be determined, 1 Roll. Abr. 118. pl. 6. *Fry v.*

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Porter, 1 Ch. Ca. 138. 1 Mod. 300. In *King v. Withers*, Eq. Ca. Ab. 112. pl. 10., Lord *Harcourt* was of opinion that if the title had depended upon marriage with consent, the consent would have been necessary.

In the present case there is a devise over, or what is equivalent to it, for directing that the portions shall sink into the estate or residue, is equally indicative of an intention that other persons than the daughters should take, which repels any presumption of the clause having been introduced *in terrorem*, *Amos v. Horner*, 1 Eq. Ca. Abr. 112. pl. 9. *Stratton v. Grymes*, 2 Vern. 357. *Creagh v. Wilson*, 2 Vern. 572. If this be not a gift over, a remainder man is incapable of such gift.

The additional portions under the will are given in augmentation of the original portions, and must receive the same construction: No case has been cited in the *Ecclesiastical Courts*, in which a legacy given upon a contingency has been held to be payable before the contingency has happened.

Mr. *Attorney General* in reply.

As to the original portion it is contended, 1st, That the intention is plain not to give them, except upon a marriage with consent.

2dly, That this intention is agreeable to the rules of law and equity.

The testator has not expressed any such intention; he has introduced no negative words, and has not said that the portions shall not sooner vest; but he has expressed a contrary intention by directing that the term shall cease upon his daughters' death without marriage generally. The term then is to continue if these daughters should die, although they have married without consent; but for what purpose if they are not to have their portions. The Court has adopted a rule by which the intention is to be discovered, and which is, that the restriction shall be presumed to have been introduced only *in terrorem*, where there is no limitation over; nor is such construction without reason, or likely to be contrary to the real intention of the party; for the primary object is generally to provide for the support of the child, and the secondary and inferior object to guard as much as possible against an improvident marriage; but to construe that restriction as a forfeiture after an improvident marriage has taken place would be to sacrifice the greater to the lesser object, after that lesser object can be no

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longer obtained. It has been said that the law favours the exercise of parental authority over the marriages of children. That is true as far as relates to infants; but this is an attempt to go beyond the law, and to subject the whole lives of these daughters to the control, not of parents but of strangers.

It is said that the cases upon legacies are governed by the rules of the civil law adopted to preserve an uniformity of decision, and are therefore inapplicable to the question upon the settlement which concerns land.

The civil law as such, I admit is of no authority here; and even with regard to legacies, this Court has departed from the rules of the civil law, which holds these restrictions absolutely void, and gives effect to them where there is a limitation over. This shews that this Court acts upon principles of its own, and it will therefore apply those principles in the same manner where the reason is the same. The reasons of the rule apply as much to portions out of land, as to portions out of money; but these portions are not to be considered as land, they are to arise out of a trust-term, which is purely a creature of Equity, as to which the Court will give the same favourable construction as to wills. In *King v. Withers*, Ca. temp. Talb. 117. *Jackson v. Farrand*, 2 Vern. 424. and *Precedents in Chancery* 109, the rule contended for as applicable to the portions out of land was departed from. The cases of *Fleming v. Waldgrave*, Cas. in Ch. 58. *Needham v. Vernon*, Rep. in Ch. 62. and *Aston v. Aston*, 2 Vern. 452, are authorities for the plaintiffs. This case is strictly within the principles adopted by this Court, for there is no limitation over. The direction that the portions shall sink into the residue is nugatory and useless; it is directing what would take place without any such direction, as devising an estate to an heir at law. As to these portions under the settlement, I therefore contend, 1st, That the rule of construing restrictions of this nature to be *in terrorem*, is a rule of this Court only. 2dly, That it is equally applicable to portions out of land as out of personal estate. 3dly, That with reference to the present case there is no difference between money to be raised out of land, and mere money. 4thly, That no precedent has been cited on the other side, and that there are three precedents in favour of the plaintiffs. As to the portions under the will it is contended, that they are given in augmentation of the portions under the settlement, and must receive the same construction. But though the settle-

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ment is referred to by the will, yet that is not stronger than if the very words had been repeated, and the same words in the same will have frequently received a different exposition as applied to land and money, *Papillon v. Voice*, 2 P. Wms. 471. *Forth v. Chapman*, 1 P. Wms. 663.

It is said, that in this case there is a limitation over to the remainder-man of the estate, but that is not so; it is merely directed that the portions should not be raised. The case of *Amos v. Horner* has been relied upon, but there does not appear to have been any decree in that case.

Dr. Strahan also in reply.

By the civil law, a restriction from marrying without the consent of another, was considered as amounting to a total prohibition of marriage, and was, therefore, held to be void. It has been contended, that some restrictions upon marriage were allowed by that law; but such exceptions do not amount to any contradiction of the general rule: some alteration has been said to have taken place in later times; the only alteration I am aware of was, that of giving the husband a power of restraining the second marriage of his widow, this was done by the *Lex Julia Miscella Gravina* 357; but which was afterwards abolished by the Emperor Justinian. The case in Dig. Lib. 33. tit. 4. L. 14., differs widely from the present, there the father having a son and two daughters, one of whom was married, says *Filiam meam Crispinam quam vellem tradi nuptiæ cuicunque amici mei et cognati approbarent, providebit tradi Pollianus sciens mentem meam in æqualibus portionibus in quibus et sororem ejus tradidi.*

This amounts only to a wish. By the Roman law, a father could not appoint a tutor to his children beyond the age of fourteen. This is an attempt to institute a perpetual guardianship; as to marriages, it has been urged that no precedent has been cited in the ecclesiastical courts, I certainly do not recollect any, we have no printed reports in our courts; but no precedent has been cited on the other side, the rule of law therefore, for which I contend, stands unimpeached.

On the 5th of June, 1738, Mr. Justice *Comyns*, Chief Justice *Willes*, Chief Justice *Lee*, and the Lord Chancellor, delivered the following judgments. Mr. Justice *Comyns*, after stating the case at large:—

On this case two questions have been taken into consideration.

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1. Whether the 2,000*l.* appointed to be raised by the settlement, 1712, out of the term of one thousand years, is not become due and payable to the plaintiffs, notwithstanding their marriage was without consent of their mother, dame *Catherine Aston*.

2. Whether the 2,000*l.* to be paid by the will, will not at least be due in case the 2,000*l.* by the settlement should not. *Mr. Attorney-General* has been pleased to speak to the last of these questions first, and it might be most proper on behalf of his client to do so. But as the first question seems most fully to point out and demonstrate the intention of Sir *T. Aston*, and is prior in time, I shall begin with the consideration of the first question.

1. The first question then is, when Sir *T. A.*, by voluntary settlement made after marriage, limits his estate to trustees for one thousand years, on trust to raise 2,000*l.* for the portion of each daughter, to be paid at the days of their respective marriages, with consent of mother, if living, and not married again, or if dead, or re-married with consent of trustees or survivor, his executors, administrators, and assigns, and on trust to raise 70*l. per ann.* for maintenance from eighteen till marriage with such consent, whether if a daughter after the age of twenty-one marry without consent of a mother then living, a court of equity ought to compel the trustees to raise the 2,000*l.* for portion of such daughter?

Before I deliver my opinion on this point, to avoid as much as may be, any contrariety in the determination of this Court, it may not be amiss to take a short view of the former cases on this head, and the foundation on which decreed, and lay out of the present case what seems to be uncontroverted, and admitted on all sides.

Now it is admitted on all hands, and I think, cannot be controverted, that if a pecuniary legacy be given on condition, that if the legatee marry without consent of such persons, the legacy should be void, or a less sum paid, but no devise of the money over to any other, such legacy would be decreed by this Court, though the marriage was without the consent required. This has been settled very often. In the case of *Bellasis v. Ermine*, 15 Car. 2., 1 Ch. Ca. 22. In the case of *Fleming v. Waldgrave*, 16 Car. 2. agreed 1 Ch. Ca. 58. So in the case of *Jervois v. Duke*, M. 1681, 1 Vern. 19. *Garrett v. Pritty*, Trin. 1693, 2 Vern. 293., and I know no case contrary.

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Now the true reason of these determinations seems to be what Lord Chief Baron *Hale* intimates in *Fry v. Porter*, 1 Mod. 308., to keep up a uniformity between this and the ecclesiastical court. For since by the ecclesiastical law such a condition would be looked on as illegal and void, this Court hath thought it proper to adopt the rule of the ecclesiastical law thus far, for it would be strange that a legatee should sue in the ecclesiastical court and recover, but if he sued in this Court should be barred of the same legacy.

It must likewise be admitted, that as at common law, conditions that defeat an estate are construed strictly; so where conditions have been annexed to defeat a legacy on marriage without consent, this Court hath not strained to make a breach of the condition, but hath decreed the legacy where the breach is not clear and manifest, or the condition not plain and certain. And therefore where the legacy is given to be paid at the age of twenty-one, or marriage, but without consent of the mother, void; if legatee attain the age of twenty-one, she shall have the legacy, though she after marry without consent, for being vested at the age of twenty-one, the construction must be, if she marry without consent under that age, as held *Norwood v. Norwood*, 1 Ch. Rep. 121. *King v. Withers*, 1712, Eq. Ca. Abr. 26, 112.

So if the condition annexed to legacies be, provided she be dutiful to her mother, *Vintner v. Picks*, 1 Ch. Rep. 121; or condition be annexed by will when like portion secured on land, which she released on promise it should be no prejudice, legacy was decreed, though marriage was without consent required, *Skipton v. Hampson*, 1675, Reg. B. 587. So where such a condition is annexed, and the marriage is treated of or approved by the father, who annexed the condition (which is a sort of dispensation) as in the case of *Farmer v. Compton*, 1 Ch. Rep. 1. *E. Salisbury and Bennett*, 2 Vern. 223. 2 Vent. 359. *Skin. 285. Clarke v. Berkeley*, M. 1716, 2 Vern. 720.

So if major part of trustees whose consent was required, do consent, *Wiseman v. Foster*, 2 Ch. Rep. 23; or one consents though the other do not, *Escott v. Escott*, (1) 1 Ch. Ca. 144. *Ventris v. Glydd*, 1694, by Lord Somers; or permits treaty, though no express consent, *Mesgret v. Magret*; or consent conditionally, as on making convenient settlement,

(1) *Escott v. Escott* is cited in *Fry and Porter*, 1 Ch. Ca. 144., and see *Ventris v. Glydd*, pages 362 and 374, of this case, and *Clarke v. Parker*, 19 Ves. 1.

which is offered to be done, though not done before marriage, *Bostock v. Ireton*, Finch. 234.

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I apprehend this Court will always judge whether the condition be lawful or certain, and can or ought to be performed, and whether it be performed or not according to the reason of the thing, and the true intent and meaning of the parties: but on the other hand, it must likewise be admitted, that it is a settled and established rule in this Court, that where a legacy is given on condition that if the legatee marry without consent, the money shall go to another, the legacy will not be decreed if the legatee marry without the consent required; this was agreed in the cases mentioned, *Sir H. Bellasis v. Ermine*, *Jervois v. Duke*; it was so determined in the case of *Sutton v. Jewkes*, 25 Car. 2. 2 Ch. Rep. 95. *Davis v. Halton*, *Stratton v. Grymes*, 1698, 2 Vern. 357, and in no case was it held otherwise.

This is more strongly so where the settlement is of lands by devise or otherwise, on such conditions which a man limits or disposes upon what terms he pleases, as held in *Fry v. Porter*, 1 Ch. Ca. 138, 141. 2 Ch. Rep. 26. 1 Vent. 199. 1 Mod. 300.

Much more so where the marriage with consent is required as a condition precedent to the vesting of the estate, as appears from the case of *Bertie v. Lord Falkland*, 3 Ch. Ca. 129. 1 Salk. 231. 2 Vern. 333.

Now upon what foundations is it that the Court allows not the legatee to recover, if she marry without the consent required, when there is a devise over of the money, although she should recover if it had not been devised over, since the ecclesiastical court would have equally rejected the condition in both cases alike.

I see no reason, unless it be that in one case where there was no devise over, there does not appear so full and absolute an intention of the testator or donor to defeat or disannul the legacy, it is rather a caution or admonition he desires should be complied with than a fixed resolution, she should lose the gift if she do not; and, therefore, the Court may so far conform to the ecclesiastical law as to construe not as an absolute condition, but rather intending in *terrorem*. Whereas, when there is a devise over, it is evident the testator meant she should not have it if she did not comply with the condition; as it is said in *Fry* and *Porter's* case; the *Earl of Newport* as really meant Mr. *Porter* should have the estate if his grand-daughter married without

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the consent of the Earls of *Warwick* and *Manchester*, as he meant she should have it if she married with such consent. Since then a condition not to marry without the consent of others is in itself lawful and reasonable and fit to be complied with, (for that is admitted in all these cases); where there appears a full and complete intention of the donor, who may give upon what terms and conditions he pleases, that the gift should not take effect unless the condition be performed, a Court of Equity will not dispense or relieve against a deliberate and manifest breach of it.

This being presumed I come to consider the present case more directly.

The question in this case has been considered, and very properly under two branches.

1st. Whether the plaintiffs by their marriage are entitled to the 2,000*l.* appointed by the settlement to be raised out of the term of 1000 years though such marriage was without Lady *Aston's* consent?

2nd. Whether if they should not be entitled to the portions by the settlement, they may not be entitled to the 2,000*l.* given by the will.

As to the first question, on the best consideration I can take of this matter I think they are not entitled to the 2,000*l.* by the settlement till marriage with consent of mother or trustees.

1st. It is the plain intention of Sir *T. A.* these portions should not be paid till marriage with consent; he had provided for them maintenances of 70*l.* or if their mother died or re-married 100*l.* *per annum* till marriage with consent, and then and not before the 2,000*l.* portion was to be paid.

This appears from every branch of the trust; the first branch in case Sir *T. A.* should have no son and two daughters living at his death or born after or who should marry in his life with his consent, then and in such case and not sooner or before Sir *R. B.* and Sir *J. Chesshyre* should raise 5,000*l.* and pay to or to the use of the younger of the said two daughters when and as soon as she shall be married with consent of dame *Catherine Aston*.

In the same words it is in the second branch; if no son and more than two daughters then trustees were to raise 3,000*l.* for each daughter and pay it at their respective days of marriage with such consent as aforesaid.

In like words it is in third and fourth branches; if there should be one or more sons, and but one or more daughters.

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And through the whole it is most evident his intent was daughters should have no portions paid till married with consent.

This is still more evident if possible in that Sir *T. A.* hath raised 70*l. per annum* for the maintenance of his daughters from the age of eighteen till married with such consent as aforesaid.

Now it never could be the intent that the daughters should have their portions and maintenance both at the same time; but by express words of the trust the 70*l. per annum* were to be paid till marriage with mother's consent, and if their portions were to be paid before, then they would have the portions and likewise the 70*l. per annum* both.

But it was objected that the marriage was the principal thing in the consideration of Sir *T. A.* when he raised this trust, and the consent of the mother or the trustees was only a circumstance.

But it seems plain to me that the marriage with such consent was the main thing Sir *T. A.* had in view; when he limited these portions he designed his daughters only 70*l.* or 100*l. per annum*, if they did not marry with the consent specified; if they did, they were to have the 2,000*l.* portions.

The words are express, the 2,000*l.* is to be paid at the days of their marriage with such consent as aforesaid.

It is agreed the marriage is necessary, and the consent is made as necessary to entitle them to the payment as the marriage.

It is known to be where a condition *copulative as it is called*, that is a condition consisting of several requisites, are to precede an estate in trust, all must be complied with before the estate or trust can take effect, this might be made out by several cases; but it will be sufficient to mention the case of Sir *Cesar Wood* alias *Creamer* against The Duke of *Southton*, Parl. Ca. 83.

Sir *H. Wood*, on his daughter's marriage with Duke of *S.*, made a settlement on trust to raise a maintenance for his daughter until her marriage or age of seventeen, and if his daughter after sixteen should marry and have issue male by the duke then for the settlement of the estate on such issue male, and for the better provision of the duke and his wife, on trust for the duke and his wife for their lives and after to the first and other sons in tail male.

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The daughter married the duke under sixteen, but died after without issue male and the question was, whether a trust did not arise to the duke for his life, and the Court at first thought it did, but on further consideration that decree was reversed in the House of Lords; for the trust to the duke being limited if the daughter married and had issue male, it was said the words were express and certain that there must not only be a marriage, but issue male; and when a condition copulative consisting of several branches is made precedent to any use or trust, the entire condition must be performed else the use or trust can never arise or take place, and it would be a violence to break the condition into two parts which is but one according to the plain and natural sense of it.

The same was determined in this Court and affirmed in the House of Lords, *Wood v. Webb*, Parl. Cas. 87.

The case is so apposite there needs no application; the condition of payment is on marriage with consent; they cannot be divided, but both must take place before their portion is due.

But it is further objected that the 100*l. per annum* for maintenance after Lady A.'s decease or second marriage is limited till marriage or death which shall first happen; and the proviso which determines the term of 1000 years saith, that if the 2,000*l.* portions are raised as aforesaid, or paid or secured by those in remainder or reversion, or there be no daughter or younger sons or all die, the daughters before marriage and sons before twenty-four, term shall, &c.; where the expression is before marriage generally; which shews Sir T. A. had regard to marriage, and that marriage with consent was not necessarily insisted on or required by him.

But it is most evident that the 70*l. per annum* is expressly ordered to be paid till marriage with consent as aforesaid during the life and widowhood of Dame Catherine Aston; then when the 100*l. per annum* is after her death or second marriage to be paid to the daughter till that marriage or death, it must necessarily be intended such marriage as before spoken of, that is marriage with consent; it cannot be intended or imagined that Sir T. A. should limit a longer continuance to the 70*l. per annum* than the 100*l. per annum*, that one should be paid till marriage with consent, the other determine on marriage though without consent. But if you would suppose the 100*l. per annum*

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that commences after Lady *A.*'s death or re-marriage should cease when the daughter marries whether with consent or not, consequently the portions after Lady *A.*'s death would be payable on marriage; that is not the present case, for now the question is, in respect to the portions in Lady *A.*'s lifetime, which, as the maintenance is not to cease till marriage with her consent, so the portions cannot become payable till marriage with her consent.

As to the proviso that the term of 1000 years shall cease if no daughter living or all die before marriage, it was necessary it should be so worded, for the term was not to cease on marriage without consent, since part of the trust was to pay the maintenance till marriage with consent or death, so that the term was not to determine if the daughters died before marriage without consent, for they were to have maintenance after such marriage till death; and therefore unless they died before marriage, the term was not to cease or be assigned to those in reversion or remainder.

It was likewise objected, that if such construction was put upon the words that the daughters' portions should not be payable till marriage with the mother's or trustees' consent, then the daughter who married in her father's life could never have her portion; but it is plain that the daughter who married in her father's life with his consent is not within the latter part of the clause, being provided for by the former part of it, which saith that if Sir *T. A.* should have two or more daughters living at his death or born alive after, or who should be married in his lifetime with his consent, the trustees should raise and pay 2,000*l.* as and for the portion of every such daughter, so that her portion was immediately payable, and the subsequent words to be paid at the days of their respective marriages, must relate to those that were not then married not to those that were.

Besides there is a subsequent clause, that if any daughter should be preferred or advanced in marriage by Sir *Thomas* in his lifetime, but not with the whole sums intended for their portions; and Sir *T. A.* should declare in writing such advancement was in part, then so much only should be raised as would complete the portion intended, which evidently shews that the daughter married in his lifetime was in no danger from the construction contended for of losing her fortune, for if it was not paid on the marriage the residue was to be raised by virtue of the trust.

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But the main objection was, that this constraint of marriage without consent was void by the civil law.

2nd. That the maxim of the civil law had been followed by this Court and adopted in cases similar or as strong as the present case.

3rd. That such restraints are unreasonable, tend to discourage marriage, and encourage a vicious course of life.

As to the civil law, it is a commendable study, and may be of use to the students of the common law, but ought not to interfere with, much less supersede the rules of the common law.

Mr. *Selden*, Diss. ad *Fletam*, L. 3. s. 5. seems to make a just observation in relation to its use in Courts of Westminster Hall. It is manifest, he says, that some sort of use of the civil law prevailed in the decisions to be made by the laws of England, not that any thought this realm subject to the imperial law, or that the common law could receive any change from it, for all taught the common law was to be followed where it varied from, or was repugnant to it; but where there was no express rule of the common law in the case, they recurred to the reasoning of the civil law, where that was reasonable, or if both laws were the same, they made use of the words of the civil law for the greater confirmation or illustration of the matter.

Let us then see what the civil law is in this point; but in order to judge how far it is fit to be guided by it, it will be proper to consider the ground and foundation of it.

As to the Stat. of Wills; the 32 H. 8. gave power to devise lands held by knight's service if a third part was left to descend to his heir. So the *Lex Falcidia*, among the Romans, gave power to devise so as a fourth part was left to the heir; *Legare jus esto dum non minus quam quartam partem eo Testamento Hæredes capiant*, Dig. L. 35. tit. 2. If less than a fourth was given to the heir, it was to be made up a fourth, Dig. 35. tit. 18.

If nothing was given to the heir, the will was set aside as *testament. inofficiosum*, Just. L. 2. tit. 13.

This fourth part was called *Légitima Portio*, as due of right, but as it was usually paid on marriage when the party went into another family, it was sometimes evaded by devising a fourth indeed, but on condition not to marry. To remedy this, as Dr. *Strahan* observed, the *Lex Julia* provided, *Qui cælibatus aut Viduatatis conditionem hæredi Legatorione injunxerit, hæres Legatorius eâ conditione*

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liberi sunt neque minus hæreditatem legatumve ex hac lege consequuntur: Goth. de fonte Jur. Civilis, 291. Others endeavoured to evade by hindering their children's marriage, to prevent which the law Dr. Strahan cited was made, *Qui liberos quos in potestate habent injuria prohibuerint ducere uxores vel nubere*; (and by a subsequent law,) *Qui dotem dare nolunt per Proconsules Præsidesque provinciar. coguntur in matrimonium collocare et dotare*, Dig. L. 23. tit. 2. lex 19.

The *Lex Julia* avoided conditions restrictive of marriage in legacies to widows as well as single persons, but by construction it was relaxed in respect to widows, and therefore Gaius says, if a man left a legacy to his wife, on condition if she married it should go to another, *Non dubium est quin nupserit cogenda est restituere*, Dig. 32. tit. 3. L. 14. And where, in Dig. L. 35. tit. 1. L. 22. such a condition is said to be void, *Si mulieri legatur*. Gothofred, in margin, says, *Quid si uxori*, and answers, *Si nupserit cogenda est*, and tells us the law was abrogated as to legacy to a wife, Nov. 22. Ca. 24. So God. Orph. Leg. part. 3. ca. 17. s. 9, and Swinburne say, that though such conditions be void in legacies to a single woman, the civil, or rather the canon law, allows it in legacies to a widow, especially if given by a husband to a wife, or by a son to his mother.

As the *Lex Julia* was evaded in respect of legacies to widows, another evasion was attempted, by annexing a condition that the legatee should not marry but *ad arbitrium* of such a person as the donor knew would not consent.

But this was looked on as a mere evasion, and therefore construed to be void, *Rescindi debet quod fraudendæ legis causâ adscriptum est*, Dig. L. 35. tit. 1. lex 64. But this was held so only *ubi fraus legi facta est*, and therefore a condition not to marry a particular person is allowed. *Cum ista legatum sit, Si neque Titio, neque Seio, neque Mævio nupserit. Si plures denique personæ comprehensæ fuerint: magis placuit cuilibet eorum si nupserit amissuram legatum*, Dig. L. 35. tit. 1. lex 63. So Swinb. part 4. saith, a condition not to marry a merchant, or a widow, or any living at York, or any other town, is good, unless where marriage cannot probably be had with any other; whence it appears, that by the civil law, a condition restrictive of marriage was not looked upon as unlawful, but where it amounted, in a manner, to a total restraint of marriage, which condition was made void by the express words of the *Lex Julia*.

It is true, that the Roman lawyers having construed these

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clauses which restrain marriage to the *arbitrium* or consent of others, as designed to elude the *Lex Julia*, the Ecclesiastical Courts looked upon all conditions of that nature void.

How such conditions are regarded when precedent to the vesting of the legacy, I shall hereafter consider.

But it is said, this rule of the ecclesiastical law is adopted into this Court, and has been followed in cases similar or as strong as this.

The first case mentioned was *Gresley v. Luther*, Mo. 857. and *Pigot's* case there cited by *Winch*.

The principal case was an assumpsit on promise by defendant, to give such a sum to plaintiff, in consideration she should give her consent and furtherance to her daughter's marriage with him, *Winch* objected that the consideration was not good, because in *Pigot's* case, a person to whom a legacy was given, on condition that she married with consent of her mother, had sentence for her legacy, though it was pleaded in bar she married without the mother's consent.

The case of *Pigot* was plainly a case in the Ecclesiastical Court, where such a condition (as was said before) is always disallowed, for though it was said it was pleaded in bar, that is only a common lawyer's language, to express that it was insisted on by way of defence, in the defendant's answer to the libel there, that the marriage was without the mother's consent.

And it was before proved at large, that in pecuniary legacies, on condition to be void if legatee married without the mother's consent, if no devise over, this Court decreed the legacy, though no consent, but if there was a devise over, this court has as constantly decreed otherwise.

So that there is nothing in *Pigot's* case that varies from this known and common rule and distinction as to the principal case. It was determined by the other Judges that the condition was good, and the plaintiff recovered, and the reason is given as appears Hob. 10. 1 Ro. Abr. 19. s. 9. where the same case is reported, because nature gave parents power of disposing of their children, and in nature their children are bound to obey them.

But three other cases have been relied on as equivalent to the present.

1. *Fleming v. Waldgrave*, Ch. Ca. 58.

A lease for years was made to Sir *Edward Waldgrave* and his lady in trust to raise 700*l.* for *A.* if she did not marry

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contrary to the good liking of Sir *E. W.* and his lady, if she did, then for such person as Sir *Edward* and his lady or survivor should nominate, and for want of nomination to Sir *E. W.* and lady or survivor of them. *A.* marries without their consent; they died without nomination, Lady *W.* survives, and makes a deed of gift of all her goods to *Sandall*, who prefers his bill against *Francis Copledike*, the administrator to *A.* and Lady *W.* both, to have the benefit of this lease, which was decreed to *Copledike*, the administrator.

The case is obscurely reported, and the reasons of the decree not mentioned, but it is apparent *Sandall* could not have the decree unless *A.* had married contrary to the good liking of Sir *E. W.* and his lady, and *Sandall* had been nominee of Lady *W.*; but the gift of all her goods could not amount to a nomination to entitle him to 700*l.*, and though marriage is said to be without consent, it is not said to be contrary to liking, and possibly on this foot it was decreed for the defendant, for in *Creagh v. Wilson*, 2 Vern. 573, it is said, there may be a difference between marrying without consent and marrying against consent (according to the case of *Fleming v. Waldgrave*,) and if the marriage did not appear to be against consent, then the condition was not broken, and it might well be said, it was not in the power of the trustees to dispose of the lease otherwise.

But nothing in this case shews that the condition (if she do not marry against the good liking of Sir *E. W.* and lady) would not have defeated the trust for 700*l.* if it had been broken, or that her marriage contrary to their good liking would not have been a breach of the condition.

2. Another case insisted on was *Needham* and Sir *H. Vernon*, Finch, 62.

A settlement was made by Lord *Kilmorrey* and his son in trust, to raise 1,500*l.* a-piece for portions of daughters, payable at their marriage with consent of trustees, or the major part of them, and if portions raised before marriage, they were to be improved, that they might receive the increase for better maintenance till marriage, or if any married without such consent, her portion should go over to the others, the trustees having received the rents since the death of Lord *K.*, and raised the portions; two of the daughters and the son prefer a bill against the trustees to have the benefit of the trust, and the daughters being in years, and intending not to marry, desired the portions to be laid out in the purchase of annuities for their better maintenance during their lives. It

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being agreed, if either died, the portion of her so dying, would go to her executors or administrators, and they offering to give surety to indemnify the trustees against the claims of the infant children of *Charles* Lord *K.*, to whose use the portion of her marrying without consent was given ; it was decreed accordingly.

What favours the plaintiffs, the daughters of Sir *T. A.* in this case ; the portions being payable here on marriage with consent of trustees, it was admitted, that if either of the daughters died before marriage, her portion would go to her executors or administrators.

1. All conditions are void by the civil law ; hence Chancery declares such conditions to be only in *terrorem*, unless a limitation over, for in legacies the Chancery governs itself by the civil law, for it is good in common law, as in *Fry* and *Porter*.

2. Daughters may devise these portions if they die unmarried, executors or administrators will have them so agreed.

But this decree seems to have been made by consent ; the son of Lord *K.* was party to the bill, and probably was the person to whom the benefit of the portions if not paid would result, and he consenting to the payment, the Court had less cause to be scrupulous or inquisitive about it.

When, therefore, the trustees were willing to accept security against the claim of the infant children of *Charles* Lord *K.* to whom the money was to go in case they married without consent required, which the trustees might the more readily accept, since they were not only in years and declared they would never marry, but when their fortunes were turned to annuities would be less likely to do so.

It is less to be wondered the Court, on such security, should decree these portions.

But it is manifest this decree was not founded on a supposition, that such limitation of portions to be paid at marriage, with consent of the trustees, was void or unreasonable, or would become due on marriage, without such consent, for payment was decreed before marriage, which on all hands is agreed to be necessary to entitle them to the payment of the portions.

On the contrary, such condition is supposed to be good, else what need of security to indemnify trustees against the infants to whom the money was devised over if they married without consent.

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And in case it was then apprehended, that on a trust to raise portions, payable at marriage, an interest was vested in *cestui que trust*, which would go to the executor or administrator, though she died before marriage; it has been since settled, that the portion on the death of children, before time of payment, shall sink into the estate for the benefit of the heir, and not go to the executor or administrator of the deceased. So it was determined, *Poulet v. Poulet*, and affirmed in the House of Lords, 1 Vern. 204, 321, where a term of years was created on trust to raise portions for daughters, to be paid at age of twenty-one or marriage, and the daughter died at the age of six years. So it was held in the case of *Yates v. Phettiplace*, 2 Vern. 417. Pre. in Ch. 140. So *Bruen v. Bruen*, 2 Vern. 439. Pre. in Ch. 195. So *Smith v. Smith*, 2 Vern. 92. So *Tourney v. Tourney*, Pre. in Ch. 290, where the trust was to pay a portion to the child, within a year after the father's death, with interest from his death, and the child died within the year.

So that I see not how any thing can be inferred from this case of *Needham* and Sir *H. Vernon*, to maintain that the 2,000*l.* in the present case should be payable on marriage, though without consent.

A third case insisted on, was *Semphill & Ux' v. Baily & Ux'*, Pre. in Ch. 562.

Gaskill had three daughters, *Sarah*, *Elizabeth*, and *Rebecca*; the plaintiff proposed to marry *Sarah*, the eldest, in her father's life-time, but the father declared if she did, he would not give her a groat, on which the marriage broke off; afterwards, the father by will devises his real and personal estate to his executors, on trust to raise 35*l.* *per annum* for his daughter *Sarah's* maintenance, 35*l.* *per annum* to his daughter *Elizabeth*, and if *Sarah* marry with the consent of his executors, he devises to her 1,000*l.*, to be paid at her age of twenty-one or marriage, and three years after his death he gives certain lands to his said daughter for life, remainder to her first and other sons in tail. Then he gives 1,000*l.* to *Elizabeth* at twenty-one or marriage, and other lands to her *ut supra*; then to *Rebecca* 1,000*l.* in part of her portion; and if she marry with the consent of his executors, then other lands to her *ut supra*. *Sarah*, after his death, marries plaintiff without the consent of the executors, the plaintiff being of good family and fortune, and not inferior to her.

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By Lord *Lechmere*, and King, C. J., decreed the fortune not forfeited by marriage without consent of executors. *Dormer contra* : for here appeared no intention throughout the will to make it a forfeiture; it seems nothing but a loose inconsiderate way of expressing himself, and is only a cautionary provision, that the daughter should have consideration of the executors in marriage; but the will is not coherent; in *Sarah's* bequest the clause is inserted, in *Elizabeth's* omitted, in *Rebecca's* inserted between the devise of the money and the lands.

2. No devise over, though occasion is since given for it in his will, if it had been his intent; as where he devises if any daughter die without issue, &c. he would have added, or marry without consent, if that had been his intent, or at least he would have taken notice of it in the close of his will.

So that it is plain the two judges relied on this, that it did not appear to be plainly the testator's intention to make a forfeiture, and where the intent is not plain it would be hard to construe it so.

But it was further objected here is no devise over, as in the cases where this Court hath refused to decree the legacy when legatee did not marry with the consent required.

But if no devise over, here is what seems equivalent to it. It is true the 2,000*l.*, if it be not raised, is not ordered to be raised for the benefit of another; but if it be not raised, it is ordered the estate should be exonerated from it, for the benefit of those in remainder or reversion, and if raised, it is ordered to be paid to them to whom the reversion or remainder shall belong.

What is not raised, and consequently not *in esse*, cannot properly be given over, but is it not tantamount to say it shall cease, and the premises discharged from it.

Why is it that this Court denies relief, if the condition is broken when there is a devise over? unless then the testator's intention is more apparent, that the legatee shall not have it, unless he perform the condition; but is not the intent equally apparent here? can words more strongly express that intention than to say, if my daughter die before marriage, with such consent, her portion shall never be paid, unless to those in reversion or remainder?

But here are words which yet demonstrate that more fully if possible; for it is provided the portions shall not be paid till day of marriage with such consent as required.

It is allowed the money is not payable till marriage, and I have shewn that marriage with consent, being the time ap-

pointed, both must be performed ; this is in the nature of a condition precedent, and till performed the daughters cannot be entitled ; the interest and right to the portions does not vest in them.

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It is a known and settled maxim of law, that if lands, or interest out of lands, are given on condition precedent, nothing vests till condition performed, no not although the condition at first was impossible, or after becomes so by the act of God or other unforeseen accident, Co. Lit. 206. 219.

And in this case *æquitas sequitur legem*. This was determined in Lord *Falkland v. Bertie*, 2 Vern. 333. 3 Ch. Ca. 182. Salk. 231. Mr. *Cary*, by will, devised to trustees on trust, for Mrs. *Willoughby*, his heir at law, in case she married Lord *Guildford* in three years after his decease, for her life, then to her first and other sons by Lord *Guildford* in tail male. She did not marry him, and though there were offers on her part, and many circumstances shewing inclination to perform, yet by Lord *Somers*, assisted by *Holt* and *Treby*, Chief Justices, all persons of consummate abilities in that profession, it was held equity could not relieve, and it was there said it would not be easy to find a precedent for relief in a court of equity, in case of a condition precedent.

It is true where recompence can be had, courts of equity have relieved against breaches of conditions precedent, as well as conditions subsequent, (though that was not formerly done,) and the reason seems as strong where compensation can be made ; but that is not to be done in the present case. So in case of *Creagh v. Wilson*, 2 Vern. 572. 1 Eq. Ca. Ab. 111. Devise of 200*l.* to grand-daughter if she continued with executor till twenty-one, but if taken away by the father, who was a papist, or married without consent of the executor, but 10*l.* She went to her father with the executor's consent, who married her to a papist. By Lord *Couper* : she could not be relieved, for he looked upon this as a condition precedent.

It is true this was a marriage to a papist directly contrary to the testator's intent, but it shews how difficult it is to have relief in equity on breach of condition precedent.

But it is said, the civil law makes no difference between a condition precedent and subsequent.

But this rule must be understood with allowance, in some respect a condition subsequent by the civil law, resembles a condition precedent at common law ; for if a legacy be given on a condition subsequent by the common law the legatee

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is entitled presently, but on breach of the condition it is forfeited and gone.

But by the civil law *conditio suspendit legatum*, and therefore the legatee could not take it till he had performed the condition.

But this was remedied in some degree by *lex Mutiana*, by which on caution given specially where the condition was in the negative not to break it he should have it in the mean time.

It is likewise a known maxim in the civil law, that a condition unlawfully impossible, or to do what would bring infamy, is void, and the legacy is absolute; so whether the condition be subsequent or precedent, it is all one, and the effect is the same.

But there are conditions the civil law allows to be good, and then there is this difference between a condition subsequent and precedent; if it be subsequent, though the party cannot have it before the condition performed, unless the caution be given pursuant to *lex Mutiana*, yet the interest vests, and if the party die before the condition performed, *transit in hæredem*, who on performance shall have it, *Legatum conditionale non perit licet gravatus* (the person who is to perform the condition) *moriatur pendente conditione*, Dig. Lib. 35. tit. 1. L. 65.

But if condition be precedent, it does not vest till performance; and if the party dies before, it is lost. *Legata sub conditione relicta non statim sed cum conditio existerit, deberi incipiunt; ideoque interim delegari non poterunt*. Dig. 35. tit. 1. L. 41.

So in all sorts of legacies, two times are considerable, the time when it becomes due, and the time when it is payable *Dies cedit cum Pecunia incipit deberi; dies venit cum peti potest ff de verb signif.*

And therefore, as *Donat* observes from the civil law, Lib. 4. tit. 2., all legacies are pure, or absolute, or payable upon a term, i. e. at a day future, or payable upon a condition performed; if the legacy be absolute, it is due and payable at the testator's death, if given at a day future, it is due at testator's death, but not demandable till time of payment; if given on condition, it is due and demandable when the condition performed. *Si legatum sit purum ex die mortis dies ejus cedit; sed ante diem peti non potest si sub conditione sit relictum, non prius dies legati cedit quam conditio fuerit impleta.*

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Now when a legacy is payable at a time uncertain, in the event that may or may not come (as in the present case, at day of marriage, with consent of the mother or trustees) the legacy is conditional, and consequently does not vest, nor can be transmitted till the condition performed. So in Dig. L. 36. tit. 2. L. 21, 22, if legacy be given to a person *cum pubes erit cum in familiam nupserit cum in magistratum inierit, &c. nisi tempus conditione obligit neque res pertinere neque dies legati, cedere potest.* So Swin. part 4. s. 17. fol. 308, takes the difference where legacy is given at a day certain or time uncertain ; in the first case, the legatee dying, his executor generally may recover the legacy when the time is come ; but if the legacy is given to be paid at an uncertain time, as where the testator's daughter shall marry, if he die before her marriage, the legacy is utterly extinguished.

So if given when testator's son shall die, though it be certain he will die, yet if legatee die before the son, the legacy is extinguished as if it had been conditional.

And he adds it is not material whether the uncertainty be joined to the substance of the legacy or to the execution of it, for in both cases the legacy is reputed conditional. As, if I give A. 100*l.* when my daughter shall marry, or give her an 100*l.* to be paid when my daughter shall marry ; for if A. die before her marriage, in either case the executor cannot demand it.

This seems a direct determination of the present point ; for to be paid on marriage of the daughter, or on her marriage with consent of her mother, must receive the same construction when marriage with consent is mentioned as one entire act. So that according to the rules of the civil law the plaintiffs will not be entitled till marriage with consent of the mother or trustees.

Much less would it be fit for a Court of Equity to decree trustees to pay, contrary to the express words of the trust, and plain intention of the testator.

Their trust is not to pay till marriage with consent ; shall they be obliged to act directly in opposition to the trust and pay the money on marriage without consent ?

It is said a trust ought to be construed favourably, and it ought to be so to answer the design of him who created it, but never to thwart both his words and intention.

But it was earnestly insisted on that a clause to restrain

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young women from marrying without consent of their mother or trustees was highly pernicious in its consequences, tending to discourage marriage, and promote a vicious course of life; but it hath hitherto been looked upon as a prudent and reasonable restraint, and it were happy if experience did not shew it was commonly necessary to prevent unequal and unfortunate matches.

I need not repeat what hath been cited by the counsel from the printed cases of *Fry v. Porter*, that such conditions continue children in that obedience law and nature oblige to.

The presumptuous disobedience of daughters highly merits such punishment, see *Jervois v. Duke*, 1 Vern. 19. Since it is the general sentiment of mankind that it is not only decent and prudent, but even the duty of children not to marry without the consent of parents.

The civil law made the marriage without the father's consent void, *nuptiæ consistere non possunt nisi consentiant omnes quorum in potestate sunt*, Dig. L. 23. tit. 2. L. 2.

And though this may be carrying it too far, yet *Grotius* agrees that *Filiorum officio conveniens est ut parentum consensum impetrent; nisi manifeste iniqua sit parentum voluntas*. *Grotius Jure Belli et Pacis*, L. 2. c. 5. s. 10.

So *Puff L. 6. ca. 2. p. 635*, *Officium Pietatis et reverentiæ requirit ut consilium parent: adhibeant nec eorum voluntate reluctantur*.

So by custom of *London*, a daughter married without father's consent loses her orphan's share of his personal estate, *Foden v. Howlett*, 1 Vern. 354., unless her father be reconciled before his death.

So by the civil law, the father might devolve this trust to the mother, *si in arbitrio matris pater esse voluerit cui nuptum communis filia collocaretur*, Dig. 23. tit. 2. L. 62.

And it is used as an argument against the necessity of the fathers consent, because then the mothers would be equally necessary. For in nature *omnibus ex æquo parentibus idem Hæres.*, &c. Dig. 32. tit. 2. note 25.

But it is said in this case the consent not only of the mother is required but if she be dead or married, that of the trustees, or the survivor, his executors administrators or assigns.

The present case is where the marriage was without the consent of the mother, but I see not why it should be thought

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enormous or unreasonable for the father to devolve the like trust on a friend, and rely upon him to make an executor or administrator or otherwise to assign one who might be adequate to such a trust.

The father may make whom he will trustee or guardian to his children, nor was it ever thought a wanton exercise of power in a parent to do so.

To conclude this point, I am of opinion, that since it was Sir *Thomas A's* clear intention that the 2,000*l.* to be raised by this settlement should not be paid to his daughter till marriage with consent of the mother or trustees.

Since such intention is consonant to law and reason, just in itself, and fit to be observed, since no case in this Court hath been determined, where, under all the circumstances of the present case, portions have been decreed on marriage without the consent required, and the present case falls almost under all the circumstances where relief has been refused.

Since the daughters have a competent maintenance provided for their lives, though the portions intended if they married without consent should not belong to them.

I am of opinion that it is not agreeable to the rules of equity and conscience to decree the trustees to raise and pay the 2,000*l.* given by this settlement till their marriage with the consent of the mother.

I proceed to consider the second question, whether daughters will not be entitled to the additional portions of 2,000*l.* given by the will, although the marriage was without the mothers consent.

And it must be owned this question deserves a distinct consideration, for I think the 2,000*l.* by the will is but a personal legacy, and not monies to be raised out of land, for though there is a term of 500 years out of the *Norfolk* estate limited to the defendants *Wright* and *Kenrick*, on trust to raise 3,100*l.*, yet when it is raised, it is appointed to be paid to his executrix, to be accounted as part of his personal estate, and to come in lieu of the like sum disbursed by him out of his personal estate, to discharge the debts and legacies charged on that *Norfolk* estate

And then out of that 3,100*l.* and the rest of his personal estate those additional portions were to be paid. So that I can look upon it only as a personal legacy.

Here does not appear any devise over if the marriage be without consent, as in case of the portions by the settlement.

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It is true the mother is made executrix and residuary legatee, but in the case of *Garrett v. Pritty*, 2 Vern. 293, where 3,000*l.* was decreed to his daughter, provided if she married without the consent of one, she should have but 500*l.*, and made his son executor and residuary legatee, it was held this was not a devise over, for it only sunk into the surplus of the personal estate.

In the case of *Amos v. Horner*, 1 Eq. Ca. Ab. 112. indeed it is said that a devise of the residue of personal estate was a devise over, but there appears no judgment in that case in the Register.

And *Semphill v. Baily*, Precedents in Chan. 562. It is said that a devise of the overplus would not do, and therefore it is at least doubtful that the making Lady *Aston* residuary legatee will not amount to a devise over.

Upon which at first I apprehended but little difference between this and the common case, where a pecuniary legacy is on condition not to marry without consent without any devise over.

But upon more mature consideration of the several clauses of the will, the manner of wording, and the true intent and meaning of the testator, I am of opinion that the additional portions must follow the original portions, and the plaintiffs cannot be entitled to them but on marriage with the consent required.

There is not a more settled nor a more just and equitable rule for the construction of wills than that the intent of the testator expressed by the words of the will should take place if it be consistent with the rules of law.

Now the intention of Sir *Thomas Aston* is most manifest that the additional portions should pursue the portions by the settlement, for first he gives this 2,000*l.* not only as and for the augmentation of the portions provided by the settlement, but to be paid at such times and subject to such conditions provisos limitations and agreements as the original portions by the said settlement are made subject and liable to.

How then can the 2,000*l.* additional portion be paid at the same time with the original portion or subject to the same condition or limitation if it be paid on marriage, and the portion by the settlement is not paid till marriage with consent if it be paid before the other becomes payable?

How can it be an augmentation of portion by the settlement which is not yet payable and perhaps never will?

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have no application to the present question. What has been said of penalties and forfeitures is out of the case. The question is, whether the interest of the daughters in these portions has become vested. It cannot be said to have been forfeited because the daughters may marry again with consent and so become entitled. So likewise what has been said with respect to parental authority is out of the case, and with it the objection that in certain events the consent of strangers might be necessary, for I think there would have been no difference if these portions had been given by a stranger instead of a father. These restrictions do not prevail by the authority of the person imposing them, but operate as conditions annexed to the gift, *cujus est dare ejus est disponere*.

The single question is, whether a man can give a sum of money to another when that other marries with the consent of a third person so that it shall not be payable until such marriage with consent.

Upon this, two points have been made.

1st. As to Sir *Thomas Aston's* intention.

2ndly. As to the legality of such intention.

To ascertain the intention we must look at the settlement and will together: and upon both the intention is perfectly clear.

As to the legality of the intention I will first consider the settlement. The intention being plain, nothing but a rule of law or equity equally plain shall prevail to set it aside. It was truly said by *Dyer*, as quoted by Lord C. J. *Treby*, in *Falkland v. Bertie*, 2 Vern. 337., that men's deeds and wills by which they settle their estates are the laws which private men are allowed to make, and that they are not to be altered even by the king in his courts of law or conscience.

The question as to the portions under the settlement must be decided according to the rules of common law relating to lands, for although the portions are to be considered as money with respect to the daughters they are to be considered as land with respect to the estate of the heir.

The distinction between pecuniary portions and portions out of land is settled in the cases of *Tournay v. Tournay*, Prec. in Ch. 290. and *Poulet v. Poulet*, 1 Vern. 204. In this case the marriage with consent must be considered either as a condition precedent or as a limitation of the time of pay-

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between a legacy given upon a term, and upon a condition, in case the legacy is given payable at a time certain it is *debitum in presenti* though *solvendum in futuro*.

But if it be given to be paid at a time uncertain in the event whether it will ever come or not, it is conditional and does not vest till condition performed, that is till the time of payment is come.

The cases before quoted from the civil law make this plain and I need not repeat them, the expressions of Swinb. part 4. s. 17. fo. 308., are full to this purpose, and I know no authority in the civil law books or in this Court to the contrary.

The rules of the civil law when consonant to reason and conscience, and not interfering with any maxim of the common law have frequently been followed by this Court not as they were rules of civil law, but as they were rules of reason and equity.

This being so it would be hard for this Court to decree the payment of a legacy upon the foundation of the civil law (which seems to be the ground why they determine a condition not to marry without consent to be only in *terrorem* where no devise over) in an instance where the civil law would not allow the legacy to be payable.

Since then it appears to be the full intention of the testator Sir T. A. that the additional portions by the will should not be paid till the payment of the original portions.

Since such intention is lawful and reasonable it being not only consonant to law, but prudent in the parent to augment the provision of a child upon its obedience in taking the consent required by her father in her marriage.

Since in this case there is a maintenance and provision given to the child though not so large, though she marry without consent.

Since there is no case in equity where a legacy given on marriage with consent hath been decreed on marriage without consent, and the civil law would disallow such legacy.

I am of opinion that the plaintiffs are not entitled to the additional portions any more than to those by the settlement.

WILLES, C. J.—I shall first endeavour to strip this case of the many clouds which have been thrown about it, many distinctions have been taken and many cases cited which

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have no application to the present question. What has been said of penalties and forfeitures is out of the case. The question is, whether the interest of the daughters in these portions has become vested. It cannot be said to have been forfeited because the daughters may marry again with consent and so become entitled. So likewise what has been said with respect to parental authority is out of the case, and with it the objection that in certain events the consent of strangers might be necessary, for I think there would have been no difference if these portions had been given by a stranger instead of a father. These restrictions do not prevail by the authority of the person imposing them, but operate as conditions annexed to the gift, *cujus est dare ejus est disponere*.

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1st. As to Sir *Thomas Aston's* intention.

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ment and more properly the latter; all the cases cited to the contrary stand upon particular reasons.

In the case of *Salisbury v. Bennet*, 2 Vern. 223., the Court went upon the ground of a dispensation by the father. In *King v. Withers*, of two events either of which was to entitle the daughter, one had happened.

It has been said that Courts of Equity have dispensed with conditions in cases of children's portions but that power has been exercised only where it was necessary to carry into execution the intention of parties, never to destroy it.

The question as to the portions under the will is more doubtful, but when properly examined will be found to be governed by the same rule. The civil law is of no authority in this kingdom further than it has been adopted and received. The authorities cited by the doctors are out of the *Roman* civil law only, and even from them it is not plain that the civil law would hold this restriction to be void. That law recognizes the distinction between a day certain, which may be ascertained by computation of time, and a time to be ascertained by the happening of a future event. In this case that future event is the payment of the original portions.

The rule that the condition shall be considered as *in terrorem* only where there is no devise over, is too well established to be now shaken, but to make that rule intelligible, it must not be considered as a principle of equity, but as a rule which equity has adopted, to ascertain the testator's intention. A limitation over is one evidence of intention, but that intention may be as strongly proved by other means, as in this case by the expressions used by the testator himself.

In the case of *Paget v. Haywood*, indeed, it was held, that a devise over to the residuary devisee was as if there had been no devise over at all, but that was contrary to *Amos v. Horner*, 1 Eq. Ca. Abr. 112. which case, though it at first went off for want of parties, appears by the calendar to have afterwards come on again, and that a decree was made. It is not to be found in the Register's Book, and probably was not drawn up, because it was against the plaintiff; but I have been told by the author of *Equity Cases Abridged*, that he had that case from a gentleman who then attended this Court, and took it at the bar.

It has been said, that the will, as it refers to the settle-

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ment, ought to be construed as if all the words of the settlement were repeated in it; if that were so, there would be a clear devise over to the remainder man, but I do not think that all the words of the settlement are to be introduced into the will, but such words only as will have the same effect in the will as the words in the settlement have upon the money to arise out of the real estate.

I would submit to the Court whether, as Lady *Aston* is residuary devisee, and consequently may have an interest in refusing her consent, it might not be proper to send it to the Master to enquire whether she has exercised her power with impartiality, and had reason for refusing her consent.

LEE C. J.—I entirely agree that this is a condition annexed to the portion and precedent. If so, the question is whether it is a good one.

There are but three sorts of conditions which are void by our law: 1st, Those which are repugnant. 2dly, Those which are impossible. 3dly, Those which are *mala in se*, or *mala prohibita*, by our law.

That conditions in restraint of marriage do not fall under this last description is clear from many authorities, Stat. 4 & 5 Ph. & Mary. The custom of *London*, Vaughan, 333. 1 Rol. Abr. 418. *Fry v. Porter*, 1 Mod. 300. The civil law, if repugnant to the principles of the English law, is of no weight, 1 Hales, Pl. Cor. c. 3. If this Court considered the condition as unlawful, how could it ever give effect to it, as in *Stratton v. Grymes*, 2 Vern. 357.

It is said that there is but little difference between a condition precedent and subsequent, but I think that there is a great difference. To dispense with a condition precedent would be to give away a man's estate contrary to his express direction. A condition describing the qualification of the daughters who are to take, is in its nature a condition precedent. It was so held by Lord Cowper, in *Oreagh v. Wilson*, 2 Vern. 572. In *Needham v. Vernon*, Lord Nottingham considered the portions as vested. The case of *Semphill v. Baily* was decided upon the particular penning and construction of the will, but I am inclined to be of opinion against that decree, because it was a case of a condition precedent. Upon the particular penning and expressions of this deed, I am of opinion that these portions never vested, if so, all the cases in which it has been decided that portions shall sink into the estate upon the party's dying before the time of payment, are authorities for the defendants.

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As to the portions under the will, it is to be observed, that the case of *Bellasis v. Ermine*, Ch. Ca. 22. was decided upon a plea, and the Court said that they would not defeat the portion, which shews that they took the condition to be subsequent, and not precedent. In *Aston v. Aston*, 2 Vern. 452. and *Garrett v. Pritty*, 2 Vern. 293. the conditions were subsequent.

Taking this to be in the nature of a condition precedent, or as fixing the time of payment, I think that these portions are not payable.

June 5, 1738.

LORD CHANCELLOR.—I think myself extremely obliged to my Lords the Judges for their learned advice and assistance in this case, the right to which I esteem one of the greatest privileges belonging to the person who presides in this Court. As I concur with them in opinion upon the several points in the cause, the great pains they have taken might have excused me from spending more of the time of the Court by entering into the argument of it; but as this is a cause of great expectation, and it is of great consequence in itself, and as the decree which I shall pronounce will be contrary to that of his Honour the *Master of the Rolls*, for whose judgment I have the utmost deference, I will on this occasion lay my thoughts before you at large, though at the same time I am sensible that it will be impossible to do it without repeating many things which have been already said in a much better manner.

The case has been fully stated, and the general questions arising upon it are two.

1. Whether the original portions provided by Sir *Thomas Aston's* settlement are become due and payable to the plaintiffs?

2. Whether the additional portions given by the will are become due and payable?

I shall follow the same method which has been taken by my Lords the Judges, and begin with the first question, the determination whereof depends on the declaration of the trust of the term of 1000 years, the words of which, so far as it relates to the point in judgment, are plain.

“That in case Sir *T. Aston* shall happen to have one or
“more son or sons by his wife living at the time of his death,
“and more daughters than one living at that time, or who
“shall in his lifetime be married with his consent, then it
“shall and may be lawful for the said trustees, by and out of
“the rents and profits of the premises, and by such interest,

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"produce, and encrease as shall be made of the same, or by such mortgage or leasing thereof, or of any part thereof, or such ways and means as to them shall seem meet, to raise, levy, and secure, for and as the portion of every such respective daughter the sum of 2,000*l.*, and after such respective sum of 2,000*l.* shall be so received and raised, shall and may pay to every such daughter the sum of 2,000*l.* at the respective days of their marriage with the consent of my Lady *Aston*, his wife, if she shall be then living, and not married to a second husband, or if she be dead or married again, then with the consent of the trustees or survivor of them, or the executors, administrators, or assigns of the survivor."

"And also by and out of the rents and profits of the premises yearly to pay such daughters the respective yearly sums of 50*l.* a-piece till their age of eighteen, and after that age until their respective marriage, with such consent as aforesaid, and during the life and until the second marriage of Dame *Catherine*, the yearly sum of 70*l.* a-piece, and after the respective marriages of such daughters with such consent as aforesaid, or after the decease or second marriage of Dame *Catherine*, then the yearly sum of 100*l.* until their respective marriages or deaths, which shall first happen."

These being the words of the declaration of trust, the proper considerations arising thereupon are,

1. What is the genuine meaning and construction of the words?

2. What appears from them to have been the intention of Sir *T. Aston*, the maker of this settlement. And

3. Whether there is any rule of law or equity that will excuse the want of such a consent to the marriages of these ladies, as the words express, or will make *marriage* alone without such consent sufficient to give a right to demand the payment of these portions.

1. As to the construction of the words, though there may be some incorrectness and obscurity in other cases, which are put in different parts of this clause, yet, as to the event which has now happened, it is scarce possible to use expressions more precise and certain, one may turn, and shew a very plain thing in different lights, but no comment or exposition can make it plainer. It has been argued at the bar, as if the words—*with the consent of Dame Catherine*—created a condition, and much hath been said upon that head, but

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I must own I have not sagacity enough to find out any condition in this sentence.

It is neither expressed in words of condition, neither in the nature of the thing doth it amount to one. .

Where a gift is made, or the payment of a sum of money directed upon a *condition*, either precedent or subsequent, the thing is first given or the payment directed to be made, and the condition is collaterally annexed to it; for instance, suppose it had been expressed in this case, *to be paid to every such daughter at the respective days of their marriage, if, or provided such marriage be with the consent of Dame Catherine*, there, or any other phrase of the like kind would have made a condition, but here is no gift or direction for the payment, save only upon the happening of this fact or event.

It is only a limitation or appointment of payment at an uncertain time, and a marriage so qualified and circumstanced, *i. e. so consented to*, is to fix and determine that time.

This created a great difficulty on the parts of the plaintiffs, how to make a portion out of land become payable before a time or contingency, on which it is given, hath happened.

And indeed a hard task it was, but in order to support it, on the first argument it was insisted, that these portions were to be considered as vested before the marriage or time of payment, which should happen by force of the precedent part of the clause, whereby the trustees are directed to raise and receive the money *for and as the portions of every such respective daughter*, which words were said to amount to a gift thereof to them antecedent to the time of payment, but for this there is no colour, either from the general reason of the thing, or from the frame of this particular settlement. Nothing has been more fixed in this Court ever since the case of *Poulet v. Poulet*, Pas. 1685. and afterwards affirmed in the House of Lords, than that portions charged upon land do not become vested till the time of payment arrives. And it is still plainer upon the frame of this settlement; because particular provisions are created by way of annuities, not out of the portions, or the interest of the portions, but out of the rents and profits of the estate, till the time of payment shall come, and if any of the daughters die before that time, *i. e. before marriage with such consent*, the sum intended for the portion is directed not to go to her representatives, but to cease, or if any part of it should have been raised, to be paid over to the immediate remainder man.

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This proves that the meaning of the words—*for and as the portion of every such daughter*—is only to point out the general end and purpose for which the money is to be raised, subject still to the restrictions in the other part of the deed, whereof a construction is to be made upon the whole, and that this notion of making the portion to vest before the time of payment, is repugnant to the very declaration of the trust itself.

2. As to the intention of Sir T. Aston, the maker of the settlement, no one, who reads it over, can doubt of it; it meets one, and crosses one's way in every part of the deed. He was making a settlement of his whole estate that was in his power, and providing for all the contingencies that could be foreseen to happen in his family, he limits his land to his issue male in strict settlement, and after them to his daughters in tail successively, on condition that their husbands should take and bear the name and arms of Aston.

As he appears to have it thus in his view, that his daughters might one day enjoy the estate, and sustain the name and succession of his family, he in the next place provides for their immediate support, and for securing their marrying providently, which he does by giving them portions to be paid only in case they marry with his own consent during his lifetime, or with the consent of the persons whom he thought fit to entrust after his death, and in case they should not submit to his directions in that respect, by restraining them to lesser provisions for their maintenance. This submission to his will he has extended to all the females of his family, for he has limited part of the estate itself to his wife *during her widowhood*, which nobody doubts being effectual. To make this still plainer as to his daughters, he adds a clause, that if any of his daughters should die *before she should be married with such consent as aforesaid*, then the sum intended for her portion should not be raised, or if it was raised, should be paid to the person entitled to the estate subject to the term.

Let us suppose that any of his daughters had married in his lifetime, without his consent, was it his intention that she should have this portion, notwithstanding such an act of disobedience? nobody can imagine it was.

Suppose any of the daughters should never marry at all, did he intend that she should have this portion, although she should live to be fourscore years old? most clearly not, but that she should be content with her annuity.

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Upon this head of intention it was urged by the plaintiff's counsel, that in the provisoe for determining the trusts of this term, one of the contingencies put is, *If all the daughters and younger sons shall depart this life, the daughters before their respective marriages, and the younger sons before their respective ages of twenty-four years*, then the further execution of the trusts shall cease and determine, and from hence it was inferred, that because *marriage* is here mentioned generally, without adding the words—*with such consent as aforesaid*, therefore it was his intention, that if they *married at all*, the trust should not cease, but continue for their benefit.

But this inference is not warranted by law or reason; it is an affirmative provisoe, and therefore cannot operate to alter the declaration of trust, which is the rule laid down.

It is a clause thrown in out of abundant caution, for, as the trusts for raising the portions in the case there put, could not arise, there was no need to determine it, and the present question is not on any cesser or determination of the trust, but whether it can arise for the benefit of the plaintiffs in the event which hath happened; besides, the trust could not arise on marriage without consent, because the annuities for maintenance, which make part of the trust of the same term were in that case to continue.

And as to the grantors intention it would be the most forced construction that ever was admitted in a court of justice to make his silence about *the consent of trustees* in one superfluous clause overrule his express and positive declaration, so often repeated in other clauses most material and necessary.

Some cases were put by the plaintiff's counsel in which they endeavoured to shew that it was impossible that this intention could take effect. As in case a daughter had married with Sir *T. Aston's* consent in his lifetime and received no portion; that under the strict words of this trust she could not be entitled to have a portion paid till she married again after his death with the consent of the trustees; but there is no ground to say this upon the clause now immediately under consideration, for the portion is to be paid *at the respective days of marriage, with such consent as aforesaid*; and one species of *consent* before mentioned, is that of Sir *T. Aston* himself in his lifetime, and consequently whenever he died the day of payment would be past and the money demandable immediately.

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But if that were less clear yet a marriage with his consent, in his lifetime, would undoubtedly be a dispensation with this restriction by his own authority.

It was further supposed that if my Lady *Aston* or the trustees should become lunatic, what then was to be done? But that would be a dispensation of the want of consent by the act of God, or else as in other cases of such accidents befalling trustees, that discretion which the author of the trust lodged in them would devolve upon this Court. But all this is mere refinement; and the answer to the whole of it is, that difficulties, which may by possibilities, arise in doubtful cases, afford no argument why the evident intention of parties should not in plain cases have its effect; and the rule laid down, Co. Litt. 147 a., is right, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa facienda est.*

To this reasoning from the intention, a further and more general answer was offered, that this Court construes the intent of the party in annexing such conditions or restrictions to portions to be only by way of terror, and not that they should have their absolute effect, where the portions are not given over.

This answer assumes too much, it takes it for granted, that these portions are not given over in any case of marriage without consent, which together with the general notions of such clauses being *in terrorem*, shall be examined in their proper place. Let it suffice at present to say, that I have been hitherto treating of the real and actual intention of Sir T. *Aston*; and if that plainly appears, as I think it doth from his words, then no artificial rule of interpretation, no power of any Court can make that not to be his intention, which in fact was so, however it may over-rule it.

But whether it can over-rule it or not, comes now to be considered under the next head, which is—

3. Whether there is any rule of law or equity, that will excuse the want of such a consent to the marriage of these daughters, as the words of the trust express, or will make marriage alone without such a consent sufficient to give a right to demand the payment of these portions.

That there is no such rule of the common law of England, is admitted; but it hath been contended that this is a case arising upon a trust for a term of years, and therefore only cognizable in equity, and that it is a rule in equity that such conditions or clauses in restraint of marriage annexed to a

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portion not given over upon the breach of them, are to be construed merely *in terrorem*, and the party becomes entitled to it upon marriage, though without consent.

Under this head I will first consider whether these portions are given over by the declaration of this trust in case the daughters do not marry with consent, for if they are, then by the admission of the plaintiff's own counsel, they cannot recover them.

And in the next place, supposing they are not given over, whether there be any such rule of equity as hath been contended for.

As to the first of these two points, I think the portions are by the words and intention of the parties to the settlement effectually given over by the clause which provides, *that if any of the daughters shall die before she shall be married with such consent as aforesaid, then the sum intended for her portion shall cease, and the premises be exonerated therefrom, or if raised, or so far as the same shall be raised, shall remain, and be payable to such person to whom the remainder expectant on the term, shall for the time being belong, the funeral charges of such daughter being first satisfied by such person.*

It has been said, that this is not a disposition over in case of a breach of restriction or condition (as it hath been called) by marrying without consent, but to take place only upon the daughter's dying before marriage, with such consent; but I cannot discern any difference between these two as to the present question, for whether it be considered in the one light or the other, it amounts to a disposition of the money. Another way, in case the daughter doth not, by marrying with consent qualify herself to receive it, and shews the intention that in that event she should be content with her annuity during her life.

It hath been further objected that the direction that, in case the sum be not raised, the premises shall be exonerated therefrom, is no disposition over to effectuate this restriction, because the charge is only to sink into the inheritance where it would naturally fall and rest, if never raisable, and in this respect is like the case of a legacy given over on the breach of such a condition to the residuary legatee.

I own I do not see the force of this reasoning, for if it is expressly directed to go over to the person entitled to the inheritance, then the grantor in such a settlement has as much shewn his intention that another person should take a benefit

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by such an act of disobedience in his daughter, as if it had been given to a third person, and though he could not have the individual person in view to whom it might come, yet it must be some body of his name and blood, or at furthest his heir at law, for whom persons are presumed to have a kindness extending to remote generations.

This distinguishes the present case from that of *Paget v. Hayward*, determined by his Honor the *Master of the Rolls*, Mich. 1733, which however was a new resolution different from that of *Amos v. Horner*, before Sir *John Trevor*, in 1699, and going much further than that of *Garrett v. Pritty*, before my Lord *Somers*, 2 Vern. 293., where the legacy was only left *tacitly* to fall into the surplus, without being expressly given to the residuary legatee: but however this might have been, if it had rested upon the case put, of the portion not being raised, it becomes much stronger when considered upon the other case expressed in the deeds of the money *being raised, or in part raised*, which is given over to the next remainderman for the time being.

This stands clear of all the objections of leaving or directing it to fall into the inheritance, which has been called the common mass, where the rule of law or equity would throw it, for it is an express gift to a person who might be but tenant for life, or have only some particular estate, and might not have been entitled to the principal money; if it had fallen into the inheritance, and Sir *T. Aston* has prescribed the terms whereon he intended the remainderman should receive it, *viz.* on payment of the daughter's funeral expences, so that he had it in his contemplation, that as she would have only an annuity during life, she might not leave enough to bury her.

This appeared so plain, that no way was found out at the bar to avoid it: but by saying that it was impossible any part of the portion could be received or raised before the marriage of the daughter, because this Court would not permit the trustees to enter or to mortgage, or sell, the term before the portions become payable.

I agree this Court would not permit them so to do, till one of the portions at least become payable, but it is as plain Sir *T. Aston* thought otherwise, because in the settlement he has directed the portions to be raised *by rents and profits, and by such interest produce and increase as should be made or raised by the same or by mortgage or leasing*, so that he had it in his thought that his trustees might receive the

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profits, probably during the minority of his son, and place them out at interest, to make a fund for these portions: but whether this intention could take effect upon the settlement or not, it is clear it might upon the codicil, which must be taken into the consideration of this trust, as it is part thereof, and arises out of the power reserved in the deed; by the codicil he has appointed all the profits of his *Cheshire* estate, (except what was limited to his wife for her widowhood,) until his son should attain twenty-five, over and above what he allots for his maintenance, to be applied toward raising these portions, subject to the same contingencies and restrictions as are mentioned in the settlement, for after having recited the settlement, the words are, *for the better raising the portions in and by the said indenture of release appointed to be raised according as the same are therein and thereby appointed to be raised and paid.*

But there may happen one case, even upon the deed, in which part of a portion may rightfully be raised before it is payable, and that is, if one of the daughters should happen to marry with consent, and it should be thought fit to raise her portion by sale, it might not be possible to sell only just so much land as would raise the exact sum of 2,000*l.*, then there would be a surplus, which must be laid up and improved at interest, towards the portion of some other daughter, and if that should never become payable to any daughter, the immediate remainderman would become entitled to it by virtue of this disposition over.

But admitting here was clearly no disposition over, it remains to be considered whether there is any rule of equity that such conditions or clauses in restraint of marriage annexed to a *portion* not given over, upon the breach of them are to be construed merely *in terrorem*, and that the party becomes entitled to it upon marriage, though without consent.

I own this is the first time I ever heard of such a general rule concerning portions, for I always took it to relate only to legacies.

The original jurisdiction of legacies being by the constitution of this kingdom vested in the Ecclesiastical Courts, the rule of judging concerning them must be by their law, which is the canon and civil law so far as they are here received.

What is the rule of the civil law upon this point as received and practised in their Courts appears to me very un-

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certain upon what I have heard from the learned doctors who argued this case, for I do not find any one precedent or determination produced by them out of those Courts ; therefore the most ancient and best evidence of it, which I have yet heard of arises out of a book of the common law, *Moor*, 857. In *Pigot's* case cited by Justice *Winch*, where a legacy being given to a daughter on condition of marriage with consent of her mother, she married without such consent, and notwithstanding that, had a sentence in the Spiritual Court for her legacy.

As to the quotations produced out of the books of the *Roman* law, they are of no authority here if the rules laid down in them are not shewn to have been received ; and they admit of so many distinctions and allow so many limitations under which certain suspensions or restraints of marriage may be good, that it is difficult to infer any general doctrine from them, neither have I heard any authority from that law that a condition of marriage with the consent of a parent was void ; but all the cases put are of marrying with the consent of some stranger, Just. Justit. L. 1. tit. 10. *De Nuptiis* has these words :—" *Justas nuptias inter se cives Romani contrahunt qui secundum præcepta legum coeunt; dum tamen si filii familiarum sint, consensum habent parentum quorum in potestate sunt. Nam hoc fieri debere, et civilis et naturalis ratio suadet in tantum ut jussus parentis præcedere debeat.*

That this law not only extended to the father but to the mother also after his death, appears from the, *Code lib. 5. tit. 4. De Nuptiis leg. 1.* " *Cum de nuptiis puellæ quæritur, nec inter Tutorem et matrem et propinquos de eligendo futuro marito convenit : arbitrium præsidis provinciæ necessarium est.*

Upon this text law *Gothofredus* has a gloss :—" *Matris arbitrium quæritur in eligendo filiæ marito ;* and he follows it with this citation :—" *Rogatus sum ut confirmarem nuptias puellæ facerem inquam sed mater puellæ non adest et tu scis ad nuptias contrahendas voluntatem ejus necessariam.*

Mr. *Swinburne* himself abounds in limitations to his general rule, part 4. C. 12. at the end of which he admits it to be a good limitation when the prohibition of marriage is not made conditionally by the word *if*, but by other words or adverbs of time, which (if allowed) would come very near to the present case, even although it had been of a personal legacy.

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But taking it that by the civil law such a condition or restriction of marrying with the consent of the mother when annexed to a legacy is void, and that the reason why precedents of the Spiritual Courts are not produced is, that legacies have generally been sued for in Courts of Equity; then the fact, how far that rule of the civil law has been received in *England*, must be sought after in Courts of Equity, and that will stand thus, that where the legacy is not given over upon a breach or contravention of the restriction, it is considered as being inserted *in terrorem*, or in other words, void; but where it is given over it is valid.

This then is the limitation under which this rule of the civil law has been received and practised in *England*, in the case of legacies.

But what ground is there from hence to say (as it has been urged at the bar) that this is become a general rule of equity as to portions especially such portions as are in question upon this part of the case?

There will appear to be no ground at all for it when two things are considered.

1st. The particular reason for which this doctrine was admitted in the case of legacies.

2nd. The nature of these portions and the difference between them and legacies.

1st. The particular reason why the rule of the civil law, (thus expounded or qualified) was admitted in the case of legacies was to preserve an uniformity of judgments.

The Spiritual Court had the original jurisdiction of legacies. This Court held plea of them only as incident to an account of assets, in like manner as they do of a debt by bond sued for here against an executor. Therefore as in the case of a bond debt, this Court must judge of the duty and of the breach of the condition by the same rules as the court of common law, which in that case had the original jurisdiction, would have done; so in the case of legacies, it was necessary that they should judge by the same rule as the Spiritual Court would have done; because, otherwise it would give the party a liberty to vary the right of the demand by going into either Court, and by electing his Court to elect what judgment he would have.

But then this Court did as all Courts must do, declare and expound what the rule of that law was, by which they were to judge; and as the *Roman* civil law allowed dispositions over to pious uses or in favour of liberty to be good

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to effectuate such a condition or restriction ; so this Court expounded it in such a manner as to allow of any disposition over whatsoever, and with this exposition received the rule.

This is what has been hitherto understood as the ground of this doctrine, and as to the general foundation of its being introduced in order to preserve an uniformity of judgments it was fully laid down, almost in the same words I have delivered it, by his honour the *Master of the Rolls*, in the case of *Davies and Gardner*, which was solemnly determined after time taken for deliberation in Trin. Term, 1721.

2ndly. Consider next the nature of these portions and the difference between them and legacies.

As to the nature of these portions, they arise out of land and make part of the trust of a term of years carved out of the inheritance for that purpose ; they are in effect part of the land itself, for it may be sold during the term for the raising of them ; and if they are raised by any other method when that purpose is performed the term itself will in the consideration of this Court, attend upon and become part of the inheritance.

These portions are also created by deed and not by will ; have nothing in them testamentary.

The consequence resulting from hence is, that they never were or could be the subject of ecclesiastical jurisdiction or governed by the rules of the civil law, which proves that the original ground of admitting those rules in legatary cases, I mean the preserving an uniformity of determination, totally fails here.

Further, as they make part of the trust of a term conveyed out of a real estate for that purpose they are subject to the same rules of property as the land out of which they are derived, that is, the rules of the common law of *England* and the equity naturally arising upon those rules.

Æquitas sequitur legem is the allowed general maxim of this Court ; the meaning of which is, that wherever equity places the trust or beneficial interest in any thing, it is (generally speaking) governed by the like rules as the legal property in that thing would be governed by.

And this is to be understood respectively according to the different laws to which the constitution of this kingdom subjects that kind of property which happens to be in question. If it is a legatary or testamentary matter the king's ecclesiastical law ; if a maritime matter the Admiralty law ; if a matter concerning a real estate the common law of the land.

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On this ground it is that limitations of trusts of terms of years, conditions, and contingencies annexed to them, springing trusts to arise upon the same term, are always professed to be governed by the same rules as the like limitations of the term itself would be at common law.

Now the Common Law has no such notion as that of making a condition or restriction of marrying with the consent of another to be void, but allows them all to be good.

Whilst the law of tenures in chivalry subsisted, if the ward married without consent of the lord, or did not accept such marriage as he proposed, if not disparaging, heavy penalties were inflicted.

An estate may be limited to a woman *dum sola et innupta manserit*; And *Swinburne* himself mentions a case of a grant by the king to his sister to hold so long as she continued unmarried, which was adjudged good.

If an infant under the care of this Court marries without leave of the Court, it is an established rule to commit the person concerned in it as for a contempt.

So doth the Court of Aldermen, in the case of Orphans, by the custom of *London*, which has frequently received the allowance of the courts of law on writs of *habeas corpus*.

Nay, the custom of *London* goes farther, for if the daughter of a freeman marries in his lifetime against his consent, unless he is reconciled to her before his death, she loses her orphanage part by the custom. This is laid down by my Lord Chancellor *Jefferys*, (who had been *Recorder* of the City,) in the case of *Foden v. Howlett*, 1 Vern. 354, and he adds, that it would be unreasonable to take the custom to be otherwise.

The reason of this comes up very aptly to the case in question, the rather because that custom is generally taken to be a remain of the old law, whereon the writ, *De rationabili parte bonorum* was grounded, from which an argument was drawn in favour of the plaintiffs in this cause.

To go one step further; the common law is so clear in this, that it must be admitted as a thing beyond dispute, that if Sir *T. Aston*, instead of vesting this term in trustees for raising these sums of money, had granted the legal estate of the term, or of several terms, in the land, to the daughter's themselves, to hold as joint tenants or tenants in common, and had made such term or terms respectively to commence on marriage with consent, in the same words as this trust is

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conceived, in that case if they had not married with such consent, the term or terms never could have arisen, or if he had made the legal estate of such term or terms determinable respectively on *marriage without consent*, it must have determined, and this Court could never have relieved them against it; this was the unanimous resolution in *Fry v. Porter*, 1 Ch. Ca. 138. 1 Mod. 300.

Let any one then shew me a reason why Sir *T. Aston* might not do the same thing, why he had not the same power over the trust of the term, or any part of it, which he undoubtedly had over the term itself?

Thus stands the common law of *England* upon this question, by the rules whereof, and the equity arising upon those rules, interests out of land are to be governed; for so it is laid down by my Lord *Hale* in that case of *Fry v. Porter*, where he says, *that estates governable by the law of this kingdom, without relation to another forum, ought not to be influenced by another law.*

It hath not been pretended, that if any of the daughters had married in Sir *T. Aston's* lifetime, without his consent, she could under this trust have been entitled to a portion, or that this Court could have given her any relief; and it will be difficult to shew any sound reason why those who marry without the consent of his substitutes after his death, should be in a better case.

In treating of the particular nature of these portions, I have already shewn the most considerable distinction between them and personal legacies, but there is another material difference constantly allowed by this Court, which I have already taken notice of for another purpose. If a personal legacy or portion be given by will to a daughter, payable at her age of twenty-one or day of marriage, which shall first happen, if she dies before twenty-one without being married, it shall go to her executor or administrator, but in a like case a portion charged upon land so limited shall not be raised, but shall sink into the estate. The reason of this is, that the civil law and the rule of the Spiritual Court makes such a legacy transmissible, and therefore this Court follows that rule in a legatary case for the sake of uniformity of judgments; but in the other case the civil law has no influence, and the common law would hold, that a sum of money so granted never became due, and equity in that case following the common law, this Court will not decree such a portion to be raised out of land.

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I am sensible that another reason has often been given for this difference, I mean the general favour extended to heirs at law ; but I take this to be the true one.

I should now, in the next place, consider the cases which have been quoted at the bar on either side, but those have already been so fully stated and observed upon, and the distinctions arising upon them so clearly taken by my Lords the Judges who have argued before me, that to enter into the particulars would be only to repeat what they have said in a worse manner ; thus much it is necessary to say, that I think none of them come up to the present case, not one of them is directly founded on this principle, that a condition or restriction, of *marrying with consent*, annexed to a portion to be raised out of lands under the trust of a term of years, carved out of the inheritance for that purpose, is to be deemed merely *in terrorem* or void, which is the point of this decree.

All the precedents cited go upon some other ground which avoids that point. Either the Court has distinguished upon the particular penning of the deed or will, or has found out a different meaning by construction, or else they have held that the father in his lifetime had dispensed with the condition, or that the proof amounted to sufficient evidence of a consent, as when some of the trustees consented, though others did not, or some misbehaviour was imputed to the trustee whose consent was required, which subjected his power to the controul of this Court ; and in two of the cases they decreed the money to be paid, on giving security to refund upon breach of the condition, but in none of them have they directly set aside the clause, or expunged it out of the deed till the present case.

The plaintiffs' counsel relied upon three cases as authorities in point, those were *Fleming v. Waldgrave*, 1 Ch. Ca. 58, *Needham v. Vernon*, Reports in Chancery of Lord Nottingham's time, 62, and *Aston v. Aston*, 2 Vern. 452.

As to *Fleming v. Waldgrave*, it seems by the state of the case to be a settlement of a leasehold estate, which if so, was a mere personalty, and the condition was against *marrying contrary to the consent or liking of Sir Edward Waldgrave and his lady*, which if they had *neither approved nor disapproved the match* could not be said to have happened, and besides the Court declared it was not in the power of Sir Edward Waldgrave and his lady to have disposed of this lease otherwise than for the benefit of *Thomasin Copledike*,

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which imports as if there was something in the deed that made them construe the intention to be, that in case of such a marriage the trustees should settle it to her separate use ; and supposing this resolution to have turned on any of these grounds it does not come near the present case.

As to the case of *Needham v. Vernon*, it must be admitted to be the decree of a very great and learned *Chancellor*, but I own it appears to me to be rather an award than a judgment of a court of justice proceeding by strict rules between adverse parties; and in this light my Lord *Nottingham* himself seems by his own report of it to have understood it, when he says, *But to avoid questions I decreed the portions to be paid to the plaintiffs, they giving security by recognizance, with sureties not to marry without consent of the trustees.* This amounts to a declaration that he intended rather to decline the question than to determine it, and must have been founded on some acquiescence, or its not being opposed by the defendants, for either the plaintiffs were entitled to the money or not ; if they were entitled to it they ought not to have been obliged to give security for their own money, if they were not entitled, their bill ought regularly to have been dismissed.

As to the reasoning in that case I must be excused from laying any manner of weight upon it, for it proceeds on this ground that the portions were vested, and if the daughters had died unmarried would have gone to their executors or administrators, which is a plain mistake, and contrary to all the rules and determinations of this Court touching portions charged upon land.

The case of *Aston v. Aston* is an award of the like kind with that of *Needham v. Vernon*; for the decree was for payment of the portions upon giving security to refund in case the condition should afterwards be broken ; and my Lord Keeper *Wright* held, that although the condition of marrying with consent was a condition subsequent, yet the Court could not relieve against the forfeiture, by reason of the devise over, although it was a hard condition, no time being limited, but it extended to a marriage at any time even after the age of twenty-one.

It must be admitted that as no case which comes up to that now in judgment hath been produced on the part of the plaintiffs, so neither hath any case in point been produced on the defendants part ; the reason of which may have been, that it hath been the *general received opinion*, that in cases

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of portions to be raised out of land, this Court could not give any relief against such conditions of marrying with consent; but the opinion of my Lord *Harcourt* in the case of *King v. Withers* is express and full, "That the portion in question in that cause not being a personal legacy, but to be raised out of land, it must have the same consideration as a devise of land would have, in which case it is certain that the condition could not have been dispensed with, but must have had its effect." Prec. in Ch. 350. Rep. of Cas. in Eq. 26. Cas. in Eq. Ab. 112.

I come now to the 2nd general question which is, whether the additional portions given to the plaintiffs by Sir T. *Aston's* will are become due and payable.

It must be admitted that these are pecuniary legacies, for they are given in part out of that which was originally personal estate; and as to the residue out of a fund which is declared and made to be so by the testator's will.

The consequence of this is, that they will fall under and be governed by the same rules with mere personal legacies as to the effect and operation of clauses in restraint of marriage unless there be any thing in the frame of this will, and the intention of the testator to create a distinction.

The gift is expressed only by the direction to pay, and the words are: *to be for the augmentation of their portions provided for them in and by the said in part recited indenture tripartite to be paid them at such times, and subject to such conditions, provisoes, limitations and agreements as their original portions are in and by the said indenture tripartite, made subject and liable to.*

What are those times of payment by the deed? The respective days of their marriage with the consent of my Lady *Aston*, if living.

Here it becomes material again to consider whether these words do amount to a condition, or only constitute a qualified time of payment; for if the latter be the sense and effect of these words (as I strongly incline to think it is) I do not see how the legacy can be *payable* before the time of *payment* is come.

I think this is in a manner admitted by Mr. *Swinburne* in the passage which hath been already referred to out of part 4th of his book, cap. 12, where he says "The ninth limitation is, when the prohibition is not made conditionally by this word, *if* (as *I make thee my executor if thou dost not marry*); but by other words or adverbs of time: as when

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“ the testator willeth that his daughter or wife shall be executrix, or have the use of his goods, so long as she shall remain unmarried.

But it is not necessary to rely upon this, because I am of opinion that these legacies given by the will are so connected, and as it were incorporated with the portions provided by the settlement both in the frame of the will, and in the manifest intention of the testator that it is impossible to separate them without doing violence to both.

This makes the case very particular, and takes it out of all the rules which have been laid down touching legacies given by will, independent of any deed or other instrument.

The testator first declares that they shall be for the augmentation of their portions provided for them by the settlement.

This strongly points out his intention that the one should attend upon and accompany the other, and it will be hard to shew how the daughters can become entitled to the augmentation, if they cannot have *the thing to be augmented*. He then goes on, *to be paid them at such times, and subject to such conditions, provisoes, limitations and agreements, as their original portions are in and by the said indenture tripartite, made subject and liable to*.

This still carries on the same view, and makes all the conditions and restrictions in the deed, whereupon so much observation hath been made, and which I will not repeat, operate with equal force upon the additional portions, as upon the original ones.

But what in my apprehension puts this beyond all doubt, is the next clause. *And in case any of my said daughters happen to die before her or their original portion becomes payable, then my will is that the said 2,000*l.* shall not be paid to the executors or administrators of such of them so dying.*

From hence it appears that the testator had it in his contemplation that possibly some of his daughters might die before she should be entitled to the payment of her original portion, in which case his will was that neither should her additional portion be paid, and it seems more peculiarly to have reference to that clause in the settlement, whereby it is provided, *That if any of the daughters should die before she should be married with such consent as aforesaid, then the sum intended for her portion should cease, or if ruised, should*

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be payable to such person to whom the remainder expectant on the term should for the time being belong.

It looks as if the testator, or at least the drawer of the will was apprehensive that if he had vested this disposition merely upon the nature of these personal legacies, some different rule or construction might take place upon them from what might be allowed upon the portions by the settlement; and therefore he inserted this clause to unite and consolidate them together, and can any one say it was not in the power of the testator to do this ?

Suppose he had expressed himself thus : " My will is, " that if any of my daughters shall not become entitled to " her original portion by the deed, she shall receive no benefit whatsoever from the additional portion by my will." Could any Court of Justice have said that such a clause should not have its effect ? and I am of opinion he has done the same thing by the present clause.

It would be mere playing with words to object that the negative, the exclusion of payment is laid upon the executors or administrators of such daughter, and not upon the daughter herself ; for the case here put is *of a daughter dying before her original portion becomes payable*, and therefore consistency required that the direction not to pay should be to the executors or administrators.

Suppose Mrs. *Hervey* had died before any decree obtained for the payment of her portion ; it must be admitted, that upon the supposition of her original portion not being due, her husband, although he had taken administration to her could never have recovered the additional one, but this clause would have barred him. If this be clear, surely it cannot be maintained that a legacy which cannot be transmitted to the executor or administrator of the legatee is now vested, nay actually become payable.

Upon this head of the additional portions, a question was started by my Lord Chief Justice of the Common Pleas, whether a difference may not arise between them and the original portions on account of my Lady *Aston* (whose consent to the marriage is required) being the residuary legatee in the will, and consequently to profit by refusing that consent.

The only use his Lordship made of this was to suggest a doubt if an enquiry might not be directed before a Master whether there was sufficient reason for my Lady *Aston* to refuse her consent or not.

This difference was hinted at from the bar, and a citation

was produced from the civil law to support it, *Legatum in aliend potestate poni potest; in hæredis non potest.* Dig. Lib. 30. L. 43. s. 2. The Gloss asks, *Cur non? Hæres præsumitur nunqudm velle obligari.*

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But this is not the rule of the law of England; and many cases have been adjudged where the consent of the residuary legatee or some person capable of receiving benefit by the forfeiture has been made necessary.

I admit that if some unreasonableness or misbehaviour had been proved upon the defendant my Lady *Aston*, or even alleged in the bill, and not fully answered, that might have been a ground for such a direction, but without some such misbehaviour the Court cannot controul her; she is the person who stands entrusted by the testator, on whose personal discretion he has relied; and without some abuse the Court cannot take it out of her hands and assume it to themselves.

In the present case there is not only no such proof or charge, but the contrary fully appears to the Court. The defendant has stated the fact by her answer, and that answer is not replied to. It must therefore be taken to be true, and has been read as evidence in the cause.

As to the plaintiffs, Mr. *Hervey*, and his wife, she swears that she fully acquainted them both that if her daughter married without her consent she would not be entitled to any portion. That she expressly refused to give her consent for this reason, that Mr. *Hervey* was not able to make a suitable provision either for his wife or their children, and no proposal was ever made for settling any provision at all; and therefore she thought she could not in justice or conscience, consent to the marriage, she knowing it to be contrary to the trust reposed in her by her husband, Sir *T. Aston*, who had often declared that his daughters' fortunes should not be raised or paid, unless it was to advance them in marriage.

As to the other plaintiff, Mrs. *Clutton*, the defendant swears that she was fully made acquainted with the terms and conditions on which the portions were given, and that after the original decree, and before she attained her age of twenty-one, she intermarried with Mr. *Clutton* without the defendant's consent, or even her privity.

This being the fact not disputed, but agreed between the parties, my Lady *Aston* appears so far from being guilty of any breach of the trust, that her behaviour has

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exactly pursued the terms of the trust, and the intent of the donor.

This leaves no room for a presumption of misbehaviour, and makes me very doubtful, whether to direct such an inquiry would not be a direction contrary to the evidence in the cause, and might not create some inconsistency in the decree between the determination of the Court upon the original and additional portions.

However, after having thus stated the circumstances relating to this point, I shall before I come to pronounce my decree, desire the opinion and advice of my lords the judges, whether any such direction ought to be given; and I shall be very open, nay, inclined if possible, to find room for such an inquiry, in case they shall be of opinion that it may be ordered consistently with justice, and the course of the Court.

I have now done with those arguments which appear to me necessary to be considered, in order to the determination of the merits of this cause; but the counsel for the plaintiffs having had recourse to some auxiliary arguments, which may be thought specious and popular, for that reason only, I will just touch upon them. Of this kind is what was said concerning the general policy and convenience of the Roman law, in making void all such conditions with a view to encourage marriage, and promote the propagation and encrease of the people; the reason whereof was said to extend to all countries: but arguments of this kind are not to be admitted in the decision of private rights, further than the law of the land doth admit them; and as to the case of the Romans, they had no such institution in the time of the commonwealth, for the *Lex Julia et Papia Poppæa*, which was the original law upon this point, was made in the reign of *Augustus*, not from reasons drawn from the general policy of that state, but upon a particular occasion. Great numbers of people had perished in the civil war between *Cæsar* and *Pompey*, and the following troubles; many citizens had been driven away by proscriptions, and others had deserted *Rome*, and the violent and unsettled state of things had discouraged marriage, insomuch that at the election of consuls, none were found in the whole city equal to that dignity, who were married and had children, a circumstance always allowed to give a preference in the competition for that high office, the consequence of this was, that the election fell on *Papius Mutilus et Quintus Poppæus*, two unmarried men, which

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was such a novelty, and shewed the want of people in such a strong light, that it gave rise to this law during their consulship. The history of this matter is fully related in *Gravina's Origines Juris Civilis lib. 3. cap. 36. de Lege Julid et Papid Poppad*, where he has these remarkable words, "*legem hanc non tam ratio quam necessitas expressit ab Octavio Augusto.*"

It was urged further, that laying the Roman law, and the policy of that government quite out of the case, yet the general reason of the thing, and the public good of every state requires it. But to this argument, I beg leave to oppose the general reason and policy of the common law of *England*, which has been always esteemed to be perfectly well calculated to support the public good of this country, and when topics of convenience and inconvenience are pressed, it is material to take notice that as much inconvenience may ensue from encouraging improvident matches as from restraining particular ones, especially in these times, when clandestine marriages are become one of the growing evils introductive of much calamity and ruin in families, and complained of by considerate men, as highly wanting a remedy. Let any one compare the mischiefs which have arisen from disagreeable matches forced upon young persons in consequence of restrictions of this kind, with those mischiefs which have been produced by clandestine marriages contracted without the consent of parents and guardians, and then let him determine into which scale the argument of public good ought to be cast, I do not say this with regard to the present parties, this marriage was with a person of great quality and worth, but still the general reasoning is the same

Another argument of the like sort was drawn from the natural right of children to a provision from their parents, and the relief which this Court gives in many cases in that kind beyond what the law would afford, but I can see no consequence to be drawn from hence to the present cause, because it must still be admitted, that the parent is judge of the *quantum* of the provision, the terms on which he will give it, and by the law of *England* may, if he thinks fit, absolutely disinherit a child. In this case, Sir *T. Aston* might have revoked this whole settlement by virtue of his power of revocation, and by the settlement he has declared that the annuities thereby charged on his estate, were the main-

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tenance he judged proper for his daughters till they married in the manner he intended they should do, so that he has not left them entirely without provision, but has limited and restrained it, as he had an undoubted power to do.

But after all, this argument as it is used to take off the force of such clauses in restraint of marriage, seems to be misapplied; for the rule of the civil law for making them void, and the rule of this Court for construing them to be *in terrorem*, is not applied particularly to *portions* provided by parents for children, but to personal legacies in general given by any person whatsoever: this puts all the reasoning, or rather colouring, which has been drawn at the bar from the natural right of children to be provided for by their parents, from the unreasonableness of extending the parental authority, and from the many hardships suggested on these heads, out of the case; it must be allowed that, if such restrictions annexed by a father to a sum of money charged on the *trust* of a term, are to be made void by this Court, they must be equally so when annexed by a collateral relation or a stranger, who was under no obligation at all to make any provision for the person who happens to be the object of his bounty.

Dyer, 15 a.

Against all these general arguments, there is one general objection that has great weight with me; it was used long ago by my Lord *Dyer*, and is clearly and strongly expressed by my Lord Chief Justice *Treby*, in the case of *Falkland* and *Bertie*, 2 Vern. 337, wherein those other great men, my Lord *Somers*, and my Lord Chief Justice *Holt*, entirely concurred with him. Men's deeds and wills (says he) "by which they settle their estates, are the laws that private men are allowed to make, and they are not to be altered even by the King in his courts of law or conscience; we must take them as we find them."

I do not say this in order to intimate any opinion or inclination to depart or vary from the decisions of this Court, relating to conditions or clauses, requiring the consent of guardians or trustees to marriages, in some whereof, even conditions precedent annexed to mere personal legacies have been construed to be only *in terrorem*. So far as the rules are fixed and settled, I will adhere to them, but I am not for carrying them further, and for these reasons I concur in opinion with my lords the judges, that neither the original portions nor the additional portions are yet become due or payable.

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But before I proceed to pronounce my decree, I desire to hear the sentiments of my lords the judges, as to directing the inquiry touching which my Lord Chief Justice of the Common Pleas expressed his doubt.

"After this the three judges (particularly my Lord Chief Justice *Willes*,) did *seriatim* declare their opinions that, "considering my Lady *Aston's* answer was not replied to, "and therefore must be taken as proof, and the several facts "and circumstances appearing in the cause, there was no "ground or warrant to give such a direction, and the *Lord Chancellor* declared his concurrence in opinion with them."

LORD CHANCELLOR.—The consequence of the whole is, that my direction must be thus, I do in the first place declare that neither the original portions provided by the settlement nor the additional portions given by the will, are become due and payable to the plaintiffs, or either of them, and therefore order and decree, that the order made by his Honor the *Muster of the Rolls*, on the 5th of Nov. 1736, be reversed, and that the several annuities or yearly sums of 70*l. per ann.* provided for the plaintiffs, Mrs. *Hervey* and Mrs. *Clutton*, by the said settlement, be from time to time paid according to the decree made on the hearing of this cause, to the plaintiffs Mr. *Hervey* and his wife, and Mrs. *Clutton* respectively.

The liberty given by the decree to apply to the Court for raising the portions whenever they shall become payable, and for further directions, will continue of course.

JOHN COTON Plaintiff; (1)
 and
 SIMON LUTTEREL and JUDITH
 MARIA, his Wife, Sir JOHN and Lady
 CHESHYRE and Sir ROBERT LAW- } Defendants.
 LEY }

June 6th and 7th, 1738.

1 Atk. 451. THOMAS COTON being seised, as tenant in tail of certain estates, with a remainder to the plaintiff, suffered a recovery of them in the month of June, 1731, and on the 23rd of October, 1731, conveyed all those estates to Sir *Robert Lawley* and Sir *John Chesshyre* to the use of himself and the heirs of his body, remainder to *John Coton*, his uncle, for life, remainder to trustees to preserve, &c., remainder to his first and other sons in tail, remainder to the defendant, *Judith Maria Lutterel*, his half sister, by his mother's side, for life; remainder to trustees to preserve, &c. remainder to her sons and daughters in tail; remainder to his own right heirs: and reserved to himself a power of revocation.

Upon a bill brought to impeach a settlement as obtained by the fraud and imposition of *Lady Chesshyre* and to which bill both *Lady Chesshyre* and her husband who was a trustee under the settlement were parties; Held, that both *Lady Chesshyre* and her husband were competent witnesses in support of the settlement, as at the hearing of the cause no decree could be made against her, being not interested in the event of the suit; nor could any decree be made against him so as to affect him with costs; and even if his wife had been guilty of a fraud, he being innocent and deriving no benefit from the fraud, could not be made to pay costs.

After the death of *Thomas Coton* and *John Coton*, without issue, the plaintiff who was *Thomas Coton's* great uncle and heir at law, on the father's side, filed a bill for the purpose of setting aside the settlement of the 23d of October, 1731, charging that it had been obtained by imposition and compulsion on the part of *Lady Chesshyre*, who being sister to *Thomas Coton's* mother was aunt both to him and to *Judith Maria Lutterel*.

Lady Chesshyre, was made a defendant in that suit; and both she and her husband Sir *John Chesshyre* having been

(1) The statement of this case, is with some addition from a manuscript taken from Lord *Hardwicke's* Note- Report.
 book. The judgment from *Atkyns*,

examined on the part of the defendants, in support of that settlement, their evidence was objected to by Mr. *Fazakerley* upon the ground,—

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1st. That *Lady Chesshyre* might be condemned in costs in the event of the charges against her being established, and, 2ndly, That *Sir John Chesshyre*, as a trustee named in the settlement, might be ordered to reconvey the estate; to which it was answered by the *Attorney-General* for the defendants as to the first point that no decree could be made against *Lady Chesshyre*, and that she therefore could not be ordered to pay costs. The case was compared to this; where a will was charged to have been obtained by fraud, and the witnesses are made parties. Upon the second point the case of *Tyrrell v. Holt* was relied upon, in which trustees of the whole estate though charged with fraud, were admitted by the Court of King's Bench, after solemn debate, to be examined in an issue directed out of the Court of Chancery to try the question of fraud.

LORD CHANCELLOR.—The reason why persons who at law are put into the *simulcum*, are yet admitted as witnesses, is, that they may not be made parties to a cause only to take off their evidence; but notwithstanding this, if there is a strong evidence against the *simulcum* man, that he is *particeps criminis*, the Court will exclude him from being a witness.

When this objection was first started, I must confess I was very doubtful, whether the depositions of *Sir John Chesshyre* and *Lady Chesshyre* ought to be read; but, upon the matters being fully discussed, I am of opinion that the objection goes only to their credit, and not their competency.

As to *Lady Chesshyre*, the objection depends upon these considerations, Whether she has been properly made a defendant: Now I will not say she has improperly been made a defendant, because it was necessary in order to a discovery; but it was improper she should be brought to a hearing, for she is no ways concerned in interest in the event of this suit, as she was barely an agent for Mrs. *Lutterel*, and consequently no decree can be made against her.

I will not say but there might be a case, where it might be necessary to bring such a person to hearing; as suppose *Lutterel* was out of the power of the Court, she might on a proper bill be decreed to procure a re-conveyance. So if *Lutterel* had made a settlement without notice; and so the

COTON question had been with regard to a purchaser ; but that is
v. not the case here.

LUTTERELL. This is a bill brought merely to have a re-conveyance
from the person to whom it is alleged the estate is fraudu-
lently and illegally conveyed.

But if there is no decree against Lady *Chesshyre*, how is
it possible that costs should be given against her, for if she
is no way concerned in interest there can be no decree.

Suppose then she had not been made a party, but only
charged with fraud, her evidence might certainly have been
read ; and the circumstance of her having been made a party
when no decree can be made against her cannot make any
difference.

The consequence of this is, that the objection goes only to
her credit, and not to her competency.

The next consideration is as to Sir *John Chesshyre* ; and
as I am of opinion that my Lady *Chesshyre*'s deposition
should be read, the reading his deposition is a consequence
of it ; for it would be very strange to reject his testimony,
when there is not the least colour to say, that he is concerned
in the fraud ; and as to his being a trustee and defendant, no
decree can be made against him as such, which will affect
him with costs, or in which he will be interested.

I do not know any case in this Court, where a *feme covert*,
who had been guilty of a fraud solely, without the husband,
and where he has no benefit at all from it, had been made to
pay costs, because the Court must see that the punishment
will fall upon the innocent ; it would be extremely hard to
say, that he should pay costs ; I know of no precedent, nor
do I believe the Court would do it.

The depositions of Sir *John* and Lady *Chesshyre* read ac-
cordingly.

EDWARD TRELAWNEY Plaintiff; (1)

- and

NATHANIEL BOOTH, Heir at Law,
and Administrator of ROBERT BOOTH, } Defendants.
and Others }

June 19th, 1738.

Mrs. VERE BOOTH, by will, dated the 16th of May, 1714, gave to *Robert Booth* 4,000*l.* to be laid out in land for the use of him and his heirs, and charged several annuities and sums of money thereon.

2 Atk. 307.

By will 4,000*l.* is given to *Robert Booth*, to be laid out in land for the use of him and his heirs, charged

with several sums and annuities; by a decree in Chancery, this sum was directed to be laid out in land, and in the mean time in the purchase of annuities in the names of the trustees; *Robert Booth* borrows of the plaintiff 500*l.* to be repaid in two or three months, and in a letter to the plaintiff, regrets that he had not been able to pay it, but was disappointed by a gentleman who promised to pay him some of the trust money. Upon a bill filed after his death against his representatives for the purpose of making the 4,000*l.* applicable to the payment of the debt; it was held that the 4,000*l.* must be considered as real estate, and that the plaintiff's demand being a simple contract debt could not affect it, except by marshalling the assets. (2)

By a decree of the Court of Chancery of Feb. 23, 5 Geo. I. this sum of money was directed to be laid out in land, and in the mean time in the purchase of annuities in the names of the trustees.

It appeared, that in December 1731, *Robert Booth* applied to the plaintiff to lend him 500*l.*, and that that sum was accordingly lent to him, upon his promising to repay it in two or three months. In several letters of a subsequent date he acknowledged the debt, and in one of June 24, 1732, expressed his regret that he had not been able to pay the money, and stated that he had been disappointed by a gentleman who promised to pay him part of the trust-money.

Mr. *Robert Booth* being dead, this bill was filed for payment of the debt of 500*l.* and interest out of his assets, and to have the 4,000*l.* which had been invested in South Sea Stock sold for that purpose.

(1) The whole of this case is taken from Lord Hardwicke's Note-book;

It is stated in 2 Atk. 307. as having been cited in the case of *Petty v. Barker*, June 2, 1742.

(2) See *Baden and others v. Earl of Pembroke*, 2 Vern. 52. and *Whitwick's* case there cited. *Scudamore v. Scudamore*, Pre. in Ch. 543; *Edwards v. Lady Warwick*, 2 P. Wms. 171.

TRELAWNEY Mr. *Attorney-General* for the plaintiff; Mr. *Broune* for
v. the defendant.

BOOTH. The *Lord Chancellor* decreed an account and satisfaction out of the assets, and declared that the testator's interest in the 4,000*l.* was not personal estate, but to be considered as real assets, and that the plaintiff's demand being by simple contract, could affect it only by circuitry, so far as the personal assets should happen to be exhausted by creditors, by judgment, or specialty, and referred to the cases of *Baden* and others against the Earl of *Pembroke*, 2 Vern. 52. and *Whitwick's* case, cited there by the *Master of the Rolls*, and *Scudamore v. Scudamore*, Pre. in Ch. 543. *Edwards v. Countess of Warwick*, 2 P. Wms. 171.

CATHERINE COOPER, in her own }
Right, and as Administratrix of her } Plaintiff; (1)
Sister PHILIPPA }
and
WILLIAM CLIFFORD MARTIN, and }
ELIZABETH, his Wife } Defendants.

May 2d, 1737, and June 20th, 1738.

2 Atk. 2.

Where a testator, by his will, as follows :

gives all his South Sea Stock, South Sea Annuities, and South Sea Bonds to his wife in trust that she should pay certain legacies therein mentioned, and all the rest and residue of his estate not before bequeathed, he gives to his wife ; the legacies shall only be paid out of the South Sea Stock, South Sea Annuities, and South Sea Bonds, and shall not be considered as general legacies, payable out of the other assets of the testator. (2)

“ I give and bequeath unto my said wife all my South Sea
“ Stock, South Sea Annuities, and South Sea Bonds in trust,
“ that she, my said wife, her executors and administrators,
“ shall pay unto my said nephew, *Charles Martin*, for his
“ life, the yearly sum or annuity of 50*l.* by four even and

(1) The whole of this case is taken from Lord *Hardwicke's* Note-book, except what is stated to have been said by Lord *Hardwicke* when the cause first came on, which is taken from *Atkins*, and does not appear in Lord *Hardwicke's* Note-book.
(2) See *Purse v. Snablin*, post p. 470, and the cases there cited.

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“ quarterly payments, the first quarter to commence immediately from and after the time of my decease, and upon this further trust that my said wife shall pay unto my niece *Tripe* and her children the sum of 200*l.* equally to be divided between them. To my niece *Southcot*, 100*l.* To my niece *Hilson*, 100*l.* To the youngest daughter of my nephew *John Martin*, 100*l.* To my niece *Young*, 100*l.* To my nephew *Thomas Martin*, 200*l.*, and to his daughter 100*l.* To Mrs. *Catherine Cooper*, jun. and her sister Mrs. *Philip Cooper*, 100*l.* each. To my niece Mrs. *Elizabeth Langton* 100*l.* To my nephew *William Martin* 50*l.* To Mrs. *Susan Stole*, now living with me, 50*l.* To my brother, *Charles Hobler*, and Mrs. *Baker*, 10*l.* each. To the charity school of the parish of *St. Paul, Covent Garden*, 10*l.*; and to my three servants that now live with me, the sum of 5*l.* each, and to my great nephew *William Clifford Martin* the sum of 1,000*l.*; all which legacies beforementioned, my will is, shall be paid within six months after my executrix shall have made a final end, and received the purchase-money due to me arising out of the third part of the manor of *Machelney*, in the county of *Somerset*, pursuant to a contract made by my son *Charles Martin*, deceased, with Mr. *Richard Woodford*.”

And the testator directs that the purchase-money shall be applied toward satisfying certain demands, which he enumerated; and all the rest and residue of his estate not already given and bequeathed, as well real as personal, he gave to his wife, whom he made executrix.

The S. S. Stock, S. S. Annuities, and S. S. Bonds amounted to 2,400*l.*, of which 1,590*l.* was invested in S. S. Annuities to secure the 50*l.* annuity. There remained, therefore, 810*l.*, together with the reversionary interest in the S. S. Annuities. *Philippa Martin* died, having by her will appointed *Elizabeth*, the wife of the defendant her executrix, who proved her will.

The bill was filed for payment of the two legacies given to the plaintiff and her sister *Philippa*.

The defendant, the executrix, admitted that she had received South Sea Stock, South Sea Annuities, and Bonds, and which together with 2,000*l.* Bank Stock, and other assets, would be more than sufficient to pay his debts and legacies, but insisted that neither the said Bank Stock, or any other part of the testator's personal estate, other than

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the particular part thereof appropriated as a fund for that purpose, was liable to the plaintiff's demand.

This cause came on to be heard on the 2d of May, 1737, when it appears from the *Lord Chancellor's* note, that it was ordered to stand over, with liberty for the plaintiff to amend his bill, but in what respect is not stated.

Mr. *Atkins* reports (in vol. 2. p. 2. under the name of *Cook v. Martyn*) his Lordship to have said; as the fund proves insufficient to pay the legacies, it is not the same case, as if the testator had said, I give such a sum out of an estate I am entitled to. But if the particular estate falls short of his expectations, will any body say, they shall not be paid out of the general assets.

The payment within six months is no more than a direction for the payment of the specific legacies, and does not make any alteration as to the fund.

The executrix, by her answer, confesses that she hath South Sea Bonds, South Sea Annuities, and other assets, sufficient to satisfy all the legacies, which is putting the same construction as is now contended for by the plaintiffs; and though no confession of law can possibly hurt the party, unless the fact be right, yet it would be absurd, as the very fund the testator had then in contemplation was not equal to satisfy the legacies and annuity, if I was not to extend them to the other part of the personal estate, especially where there is a residue allowed by the executrix in her answer, after all debts and legacies are satisfied.

Praying general relief in a bill is sufficient.

Praying general relief is sufficient, though the plaintiff should not be more explicit in the prayer of the bill; and Mr. *Robins*, a very eminent counsel, used to say, general relief was the best prayer next to the Lord's Prayer.

Admission of assets to one, admission to all.

The admission of assets by the executrix to one legatee, is an admission to all.

Where general relief is prayed in one part, and particular in another, the

bill must stand over to be amended. But as in this case, general relief is prayed in one part of the bill, and particular relief in another, it must stand over to be amended upon paying the costs of the day.

The cause coming on again to be heard on the 20th of June, 1738.

Mr. *Fazakerley* and Mr. *Floyer*, for the plaintiffs, contended that the plaintiff's legacies were general legacies, affecting the whole estate; that the direction to the executors as to the particular funds was not intended to affect the

rights of the legatees; it gave to them these funds in trust to pay, they were trustees of the whole estate for the same purpose. That the total of the legacies given under that trust amounted to 2,435*l.* which was the full amount of the fund without making any provision for the annuity of 50*l.*

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Mr. *Attorney-General*, for the defendant, insisted that the legacies were not chargeable upon the general fund; that the plaintiff had no more right to seek satisfaction out of any other fund than that particularly pointed out by the will, than the son had for his annuity of 50*l.*

The *Lord Chancellor* declared that the plaintiff's legacies ought to be satisfied only out of the particular fund, consisting of South Sea Stock, South Sea Annuities, and South Sea Bonds, mentioned in the testator's will, and in case that fund should be deficient to satisfy all the legacies given thereout, those legatees ought to abate in proportion. (1)

June 20, 1738.

(1) Reg. Lib. A. 1737. fol. 682.

HENRY and JOHN HITCHCOCK, re-
siduary Legatees in the Will of RICH-
ARD PRATT } Plaintiffs; (1)
and
PETER BEARDSLEY, and the Execu-
tors of RICHARD PRATT . . . } Defendants.

February 8th, 1737, and June 28th, 1738.

Upon the marriage of the testator, *Richard Pratt*, with the daughter of the defendant, *Peter Beardsley*, it was agreed that *Beardsley* should give his daughter 1,200*l.* as a marriage portion, and that *Pratt* should in three or four years after the marriage settle the 1,200*l.* on his daughter.

Where a father, upon the marriage of his daughter, gave a bill of exchange for 1,200*l.* as a marriage por-

tion, and the husband agreed to settle it upon his daughter in three or four years after the marriage; the daughter and her husband having been lost at sea within three years after the marriage; it should seem that the representative of the husband had a better right to receive the 1,200*l.* than the representative of the daughter.

The marriage took effect, and in performance of the agreement, *Beardsley* gave *Pratt* a bill of exchange for 1,200*l.*

(1) This case is taken from Lord *Hardwicke's* Note-book.

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BEARDSLEY.

Pratt and his wife, within three years after their marriage, embarked in the same vessel for *Corunna*. The vessel, with all the crew and passengers was lost on the voyage.

The defendant *Beardsley* took out letters of administration to his daughter.

The bill was brought by the residuary legatees of the husband, for payment of the sum of 1,200*l.* due on the bill of exchange.

Mr. *Fazakerley* was counsel for the plaintiffs.

Mr. *Attorney-General* and Mr. *Browne* for the defendant *Beardsley*, contended that by the agreement the 1,200*l.* must have been settled upon the wife after the husband's death, and that the husband being dead, the defendant, as representative of the wife, was therefore entitled.

A proposal having been made to divide the 1,200*l.*, and no costs on either side, the cause was adjourned, and on the 28th of June following, a decree was taken by consent upon that foot. (2)

The *Lord Chancellor* has added the following note:—
Semble, that the husband having by the bill of exchange the legal right to the money, and not obliged to settle it on his wife within three or four years, and she dying within that time, the representative of the husband had the stronger right, and the rather because in order to make a trust arise for the wife, so as to give her representative any right to take away the legal interest, it should be shewn on their part that she survived. It is incumbent upon them to prove their equity to take away the legal property vested in the husband.

COTTERELL *versus* PURCHASE. (1)

June 30th, 1738.

IN a cause that came before the Court upon a bill of review to read some charges out of the original bill, the plaintiff offered to shew some errors in the decree. To this it was objected that no errors in the decree were cognizable, but what appeared on the face of the decree, and therefore any evidence of errors but from the decree itself was opposed.

1 Atk. 290.
On arguing a demurrer to a bill of review, what appears on the face of the decree can be read only, but after a demurrer over-ruled, a plaintiff may read any evidence as at a rehearing. (2)

LORD CHANCELLOR.—It is true, on arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree; but after the demurrer is over-ruled, the plaintiffs are at liberty to read bill or answer, or any other evidence as at a re-hearing, the cause being now equally open; to which purpose the case of *Jackson v. Francis* was cited by Mr. *Browne*. (3)

(1) This case is taken from *Atkyns*. It appears from Lord *Hardwicke's* note, that the decree was varied in both the points upon which error was assigned, but no mention is made of the

question stated by Mr. *Atkyns*.

(2) See *Dashwood v. Lord Bulkeley*, 10 Ves. 230. *White v. Fussell*, 1 Ves. & Bea. 151.

(3) Reg. Lib. A. 1737. fo. 557.

NATHANIEL DURANT, and ANN his
 Wife, Aunt and Administratrix of ANNE } Plaintiffs; (1)
 PRIESTWOOD Intestate }
 and
 THOMAS PRIESTWOOD, and CHAR- }
 LOTTE ANNE PRIESTWOOD, a Ne- }
 phew and Niece of the Intestate, and }
 AMBROSE RHODES, and ELIZA- } Defendants.
 BETH his Wife, another Aunt of the }
 Intestate }

June 30th, 1738.

1 Atk. 454. ANN PRIESTWOOD died intestate, leaving two Aunts, the
 Aunts and ne- plaintiff *Ann*, and the defendant *Elizabeth*, and the defend-
 phews in equal ants her nephew and niece, who were the children of a bro-
 degrees of kin- ther deceased.
 dred and
 equally enti-
 tled under the statute of Distributions. (2)

The bill was for an account and distribution of the personal estate of the intestate, of which letters of administration had been granted to the plaintiff *Elizabeth*, who as one of the aunts claimed one fourth of the personal estate.

Mr. *Broune* for the plaintiffs contended, that an aunt was equally next of kin with nephews and nieces, being equally near in computation of degrees, and cited *Mentney v. Petty*, Pre. Ch. 593.

Mr. *Fazakerley* for the nephew and niece contended, that they, as representing their father, who was brother to the intestate, were entitled to the whole personal estate.

LORD CHANCELLOR.—I was of opinion that the aunts and nephew and niece of the intestate were in equal degree of kindred to the intestate, and decreed the distribution in fourths accordingly. *Page v. Cook*, at the Rolls, 24th June, 1732. *Harwin* and *Whiting*, ib. 7th Feb. 1732. *Barrow v. Hopkins*, 3d May, 1731, at the Rolls, all determined the same way. (3)

(1) This case is taken from Lord *Page* and *Cook*, cited in 2 Ves. 214. *Hardwicke's Note-book*.

(3) Reg. Lib. A. 1737. fol. 761.

(2) *Lloyd v. Tench*, 2 Ves. 213.

RICHARD MASON Plaintiff; (1)

and

ROBERT GOODRICH and ELIZABETH
PELL, Executors of RICHARD MA- } Defendants.
SON an Infant, and Others . . . }

July 5th, 1738.

RICHARD MASON having, when an infant, been seised in fee simple of an estate, which had descended to him from his father, a bill was filed to have the same administered under a decree of the Court.

Sir R. Walpole having contracted with the guardian of an infant for the purchase of some timber

and bark upon the infant's estate, a reference was made to the Master, in a cause for the administration of that estate, to see whether it would be for the benefit of the infant to carry the contract into effect; the Master having reported that it would; the contract was performed, and by a decree in the Court, the money arising from the sale of the timber and bark was ordered to be laid out in the purchase of land, in trust for the infant, but in the mean time to be invested in South Sea stock, in the name of the guardian. The money having been laid out in South Sea Stock, and the infant having attained the age of seventeen, dies, and by his will disposes of his personal estate, but makes no mention of the South Sea Annuities: held, that the heir at law of the infant was entitled to the South Sea Annuities, and any interest or dividends that had accrued thereon. (2)

By an order made in that cause, dated the 5th of December, 1724, upon the application of *Sir R. Walpole*, who had contracted with the guardian of the infant for the purchase of a certain quantity of timber and bark upon the estate, it was referred to the Master to enquire whether it would be for the benefit of the infant's estate to have the contract performed, provided the money arising thereby was laid out in the purchase of lands, to be conveyed to the infant as the Court should direct, and the Master having by his report of the 29th of Jan. 1724, reported that it would be for the benefit of the infant, the same was ordered by an order of the 10th February, 1724.

By the decree in that cause of the 19th of April, 1725, it was amongst other things referred to the Master, to take an account of the money raised by sale of the timber and bark, and the same was directed to be invested in the purchase of

(1) This case is taken from Lord *Hardwicke's* Note-book.

(2) Timber cut down by the guardian of an infant who has the fee, considered real estate, see *Tullit v. Tullit*, p. 15.

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land, to be conveyed in trust for the plaintiff, the infant, as the Court should direct, and in the mean time the money was to be laid out in the South Sea Annuities for the benefit of the infant, in the name of *Frances Mason*, his mother and guardian.

The sum of 1,000*l.* was accordingly laid out in the purchase of 1,085*l.* South Sea Annuities, and the infant having attained the age of seventeen years died, having by will, which made no mention of this money, given one third of the surplus of his personal estate, after payment of his debts, legacies, and funeral expences, to the defendant *Pell*, one other third part for the separate use of his aunt, and the other for the use of *Mary Goodrich*, the wife of the defendant *Goodrich*, and appointed the defendants, *Goodrich* and *Pell*, executor and executrix of his will, and leaving the plaintiff his heir at law, who by the present bill claimed this sum in the South Sea Annuities as real estate.

Mr. *Browne* and Mr. *Fazakerley* for the plaintiff, insisted that the money having been directed to be laid out in land must be considered as land.

Mr. *Attorney General* and Mr. *Murray* for the defendants contended, that the question must stand in the same state as it did whilst the infant was alive; that as soon as the timber was cut it was personal estate, and that a court of equity had no right to change the nature of the property.

The LORD CHANCELLOR decreed that the plaintiff was entitled as heir at law, under the circumstances of this case, to the 1,085*l.* South Sea Annuities, or any addition thereupon, or any dividends which have accrued due for the same since the death of Sir *Richard Mason*, and to any other money arising on the contract for the timber sold to Sir *Robert Walpole*, or the bark thereof.(3)

WILLIAM HILL, and MARY his Wife,
 and MARTHA, ELIZABETH, and CATHERINE, her Sisters, the Heirs at Law
 of MARY MAWLE } Plaintiffs; (1)

and

JOHN, JOSEPH, and DUKE MAWLE, }
 WILLIAM DAVIS, and Others . . . } Defendants.

July 8th, 1738.

By indentures of the 23d and 24th of February, 1723, being the marriage settlement of *John Post* and *Mary Mawle*, certain lands were settled to the use of *John Post* for life, remainder to the wife *Mary Mawle* for life, and subject to a power for her during her intended marriage notwithstanding her coverture to revoke the uses, and declare any other uses, to the heirs of the body of the said *Mary*, and in default of such heirs, to the only proper use and behoof of the sons and heirs of *Joseph Mawle* her father, as tenants in common for ever, and to and for no other use, intent, or purpose whatsoever. *Mary*, after her marriage with *John Post*, by deed dated the 9th September, 1724, revoked the uses of the said settlement, except the estate for life to *John Post*, and limited the estates to *Mary Godden* for a term of 1000 years, subject to redemption on payment of 400*l.*, and subject thereto to the uses of the deed of the 24th of February, 1723. The defendants, the *Mawles*, who were sons of *Joseph Mawle*, and half brothers of *Mary*, the wife of *John Post*, having borrowed 200*l.* of the defendant *Davis*, they joined with *Godden* the original mortgagee in assigning the mortgage to *Davis*, to secure the sums of 400*l.* and 200*l.* *Mary Post* had an only child, *John Nash Post*, who survived his father and mother, but died an infant, without issue. The bill prayed a redemption. The plaintiffs claimed as her heirs at law, insisting that by the settlement of the 24th of February, 1723, the defendants, the *Mawles*, were entitled to only estates for life in the premises, and by the bill prayed a redemption of the mortgages.

A limitation by deed to the heirs of the body of *Mary Post*, and for default of such issue to the sons and heirs of *Joseph Mawle*, as tenants in common for ever, confers upon the sons of *Joseph Mawle* an estate for their respective lives only, as tenants in common.

(1) This case is taken from Lord Hardwick's Note-book.

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MAWLE.

The cause first came on upon the 23d of May, 1728, when it was ordered to be restored back to the paper, and that the deeds and writings should be inspected in the hands of the mortgagee's clerk in Court, and should be produced at the hearing, and again came on upon the 8th, and was decided on the 10th of July, 1738.

Mr. *Attorney-General* and Mr. *Fazakerley* for the plaintiffs.

The plaintiffs claim as heirs at law of *Mary Post*; the defendants claim under the last limitation in the deed of the 24th of February, 1723; but under that deed they are entitled only to estates for life, for there are no words of limitation, for these words being in a deed, are to be construed strictly, and not as if they had been in a will. The word sons would only give an estate for life, and the word heirs is only a farther description of the same persons, and not a word of limitation added to the sons, for it is expressly said, heirs of the father. A limitation to a man and his successors does not carry a fee, 1 Leon. 2, 3. A limitation to one to hold to him for ever, or to a man *et hæredibus*, without the word *suis* or *hæredi* in the singular number, give only estates for life.

Mr. *Browne* for the defendants, the *Mawles*, contended that the construction ought to be as if the limitation had been to the sons of *Joseph Mawle* as tenants in common, with remainder to his right heirs.

July 10, 1738. The LORD CHANCELLOR decreed that the defendants *John*, *Joseph*, and *Duke Mawle*, were entitled to the equity of redemption of the mortgaged premises as tenants in common for their respective lives; and that the reversion in fee thereof belonged to the plaintiffs *Mary*, *Martha*, *Elizabeth*, and *Catherine*, as co-heirs of *John Nash Post*, by *Mary*, the wife of *John Post*, and directed a redemption of the mortgages by the defendants, the *Mawles*, the inheritance to remain subject to the original mortgage debt; but not to the additional 200l.; and in default of redemption the defendants, the *Mawles*, to be foreclosed as against the mortgagees, and the plaintiffs to be at liberty to redeem; and upon payment of both mortgages the mortgagees were to convey to the plaintiffs as the Master should direct; but in default, the bill so far as it seeks redemption against the defendants, the mortgagees, was to be dismissed with costs. But in case the plaintiffs should redeem, then it was ordered that the defendants, the *Mawles*, should repay to the plaintiffs

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so much as they should have paid for principal and interest of the said 200*l.*, and also for the interest of the said 400*l.* and their costs of the suit so far as the same relates to the said 200*l.* and interest, and that their estates for life should stand a security for the same, till such repayment should be made; and that upon payment to the plaintiffs by the defendants, the *Mawles*, of so much as should have been so paid by the plaintiffs for the principal and interest of the said sum of 200*l.* and the costs of the suit so far as relates to the said 200*l.* together with interest for the same and upon payment of what should have been paid by plaintiffs for interest, upon the original mortgage, and one third of the principal and interest, and one third part of the costs of the mortgages, so far as the same relate to the original mortgage with interest for the whole money so paid by the plaintiffs; it was ordered that the plaintiffs should convey the mortgage term to trustees to attend on the freehold during the lives of the defendants, the *Mawles*, and afterwards to attend the inheritance, and in case the defendants, the *Mawles*, were to make default in payment of the money due to the plaintiffs then they were to be foreclosed as against the plaintiffs. (2)

(2) Reg. Lib. A. 1737. fo. 790.

Earl of THANET and Lord TUFTON,	}	Plaintiffs; (1)
his Son		
and		
THOMAS PATTINSON and Others, Te-	}	Defendants.
nants of certain Manors		

—

July 11, 1738.

Upon a bill brought by the Earl of *Thanet* and his son to

Cross bill by some of the customary tenants on behalf of themselves and the rest of the customary tenants against Lord *Thanet* and his son, and the co-heirs of the late earl.

establish their right as lords of a manor to an arbitrary fine upon the death of the late earl and for the payment by the tenants of the fines which had been assessed;—issues were directed to try the custom; but upon a cross-bill by the tenants of the manor to establish the custom that the fines were certain against the Earl of *Thanet* and his son, and the co-heirs of the late earl, alleging that the co-heirs had entered upon the death of the late earl, and claimed the fines, the cross-bill was dismissed; the co-heirs being out of possession, and therefore not entitled to any fines; and an entry without being pursued by an ejectment not a sufficient reason for bringing the co-heirs before the court

The object of the original bill was to establish the right to an arbitrary fine not exceeding two years' value upon the death of the last admitting lord, and for payment by the tenants of these fines which had been assessed upon the death of the late Lord *Thanet*.

The cross bill by the tenants was to establish several customs and amongst others that those fines were certain, and was filed against the Earl of *Thanet* and his son, the plaintiffs, in the original bill who claimed under a recovery suffered by the late earl, and against the co-heirs of the late Earl in the nature of an interpleading bill stating that upon the death of the late Earl, they had entered and claimed the fines.

The co-heirs by their answers admitted that soon after the late Earl's death, they and their agents caused entries to be made on the premises, and insisted that the general fine due on the said Earl's death was due to them, and submitted that the ancient customs relating to the payment of the said fines ought to be established and confirmed.

Mr. *Fazakerley*, for the plaintiffs in the original cause.

If the tenants insist upon it, the right to the fine must be

(1) The statement of this case is taken from Lord *Hardwicke's* Note-book, and the judgment from a manuscript case.

tried ; but that must not be by a *Cumberland* jury ; but in some other county where an impartial trial can be had, as in the case of the Duke of *Somerset v. France*, Fortes. 41. As to the cross cause the tenants have no right to raise the question between Lord *Thanet* and the co-heirs of the late lord. Lord *Thanet* is in possession, and is therefore entitled to the fines.

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PATTINSON.

Mr. *Browne*, for the plaintiffs in the cross cause.

The object of the cross bill is to establish a custom.

The co-heirs have made a claim of which the tenants must take notice. The *dominus pro tempore* is entitled to the fine ; but in order effectually to establish the custom all those who claim the inheritance must be parties. The co-heirs unless parties to the suit would not be bound by any decree against Lord *Thanet*.

LORD CHANCELLOR.—The cross bill is improperly brought July 11, 1738. against the co-heirs. It is not properly a bill of interpleader because no offer is made to bring the fines into Court which is necessary in an interpleading bill : it is not sufficient to offer to pay what shall be decreed at the end of the cause.

Besides there is no colour to say that the co-heirs are entitled to this fine, for they can only be entitled to fines assessed by themselves after they have obtained possession ; they cannot be entitled to this fine which was assessed by Lord *Thanet's* steward.

This is not a proper case for such a bill, for the *dominus pro tempore* is entitled to the fine whether in possession by right or not, and no one out of possession can claim it. A disseisor must admit the tenant and take the fine, for no one else can hold the court to assess it. The entry was never pursued by an ejectment, and is not therefore a sufficient reason for bringing the co-heirs before the Court, nor is it necessary for the purpose of establishing the custom that the co-heirs should be brought before the Court. The rule is to bring such only before the Court as appear to be owners of the inheritance as tenants for life and remaindermen, and not every one who claims a right and is out of possession.

The cross bill therefore must be dismissed, but without costs, because it might have been demurred to, which is a sufficient reason for refusing costs at the hearing.

His Lordship directed issues to try the custom as to the fines, to be tried at the bar of the Court of King's Bench by a *Middlesex* special jury.

share thereof, and for the delivery to her of certain articles given to her by her father in his lifetime.

Elizabeth Lucas in her last illness, requested of *John Lucas* her husband, that her wearing apparel, gold watch, pearl necklace, rings, ornaments, and several pieces of plate, coins, and other things in her possession, and used by her, might be given to the plaintiff, and put into the hands of *Mrs. Dunster*, a friend, for the plaintiff's use, which *John Lucas* promised, and after her death he gave the said things to the plaintiff, and made an inventory and valuation of the same, to the amount of 187*l.* 8*s.* 6*d.*, and locked them in a strong chest, and after making three copies of the inventory, put one into the chest, and gave the key, with another copy to the said *Mrs. Dunster*, and the third to *James Lucas*, his brother : to the intent it might be known what was given, in the presence of several persons he sent the chest, with the things therein, to *Mrs. Dunster* for the plaintiff's use, and she accepted the same on the plaintiff's behalf.

John Lucas, after his first wife's death, by articles of the 26th of June 1734, between him of the first part, and *Holmes* and the defendant *Isabella* of the second part, reciting an intended marriage between him and *Isabella*, and that *Holmes* had agreed to pay him 2,000*l.*, and that he had a daughter, (the plaintiff), by a former wife ; the said *Lucas* agrees, that if he should die in the lifetime of *Isabella*, and there should be any child between them, or that the plaintiff should be then living, that then *Isabella* should enjoy one-third of his personal estate, after payment of his debts and funeral expences, and her widow's chamber, according to the ancient custom of *London*, and that the children of such marriage, together with the plaintiff, if living, should enjoy one-third of his personal estate for their respective use, and that the provision made for *Isabella* was in full of her dower and thirds.

John Lucas in 1736 died, leaving *Isabella* his wife, and one only child by her, *Isabella* the infant, and also his daughter the plaintiff, and by his will of the 10th of June 1736, directed that the surplus of his estate and effects, after his marriage contract was duly provided for, and all his personal estate, should be divided between his wife and daughters, the plaintiff, and *Isabella* the infant.

The defendant *Isabella* the widow, insists on 1,000*l.* South Sea Annuities, which the testator in his lifetime transferred to her, and as she says intended thereby to give to her

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and by word of mouth declared that she should hold and enjoy them to her own use, and before the transfer promised often to transfer them to her own use, and gave instructions to an attorney to draw a deed to declare them to her own use, who accordingly vested it in trustees, in trust that they should transfer the same to defendant for her own use, but that the testator (on information that it would be better) transferred to the defendant, and assured her that such transfer would effectually secure them to her, and which he did as a further provision, and to make it equal to her fortune.

And as to the watch, pearl necklace, and other things claimed by the plaintiff, insists that the testator voluntarily, and of his own accord, sent for the chest, and disposed and altered the things therein as he thought fit, and that he made her a present of the snuff-box, and a pearl necklace out of the chest.

It appeared in evidence that the father had obtained possession of these articles under a promise to Mrs. *Dunster* to retain them for the use of the plaintiff, and that he had offered to give a bond or note for that purpose.

Mr. *Browne* for the plaintiff in the original cause, Mr. *Attorney General* and Mr. *Fuzakerley* for the defendant the widow, cited the case of Mrs. *Hungerford*, and the case upon *Lady Cowper's* will, and *Christ's Hospital v. Bridge*, 2 Vern. 683.

July 12, 1738.

LORD CHANCELLOR.—As to the first part of the bill, I am of opinion that the delivery by *John Lucas* of the things in a chest to Mrs. *Dunster* for the use of his daughter, who was the child left by the first wife, according, as he said, to the promise made to his wife in her lifetime, is a sufficient delivery, to vest the property in the daughter, and though he did afterwards take some of the things into his possession again, as the watch and necklace, that was not sufficient to invalidate the gift, which was made perfect by the former act.

Gifts between
husband and
wife will be
supported in this Court (2),

though the law does not allow the property to pass. (3)

(2) So *Slanning v. Style*, 3 P. Wms. 334. *Bletsowe v. Sawyer*, 1 Vern. 244. *Herbert v. Herbert*, Prec. in Ch. 44. *Moore v. Freeman*, Bunb. 205.; and see *Bennet v. Davis*, 2 P. Wms. 316. And it is perfectly settled that a husband may, in this Court, be a trustee for the separate use of his wife, per

Lord Eldon, Rich v. Cockell, 9 Ves. 374. See *Walter v. Hodge*, 2 Swanst. 105.; and the cases there cited by Mr. *Swanston* in note (g).

(3) See *Moyse v. Gyles*, 2 Vern. 385. *Beard v. Beard*, 3 Atk. 72., Litt. sect. 168. Co. Litt. 112 a.

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a good transfer so as to affect the marriage articles, by making any alteration in the gross estate of the testator, the whole of which was liable by the marriage articles to be divided into such proportions which he could not voluntarily alter, and therefore this is as much a fraud on the articles, as it would be on the custom of the city of *London*, yet it is good as against the testator himself, and to be answered out of his testamentary share, if sufficient; and in this Court, gifts between husband and wife have often been supported, though the law does not allow the property to pass. It was so determined in the case of *Mrs. Hungerford*, and in *Lady Cowper's* case, before *Sir Joseph Jekyll*, where gifts from *Lord Cowper* in his lifetime were supported, and reckoned by this Court as part of the personal estate of *Lady Cowper*.

In the *Lord Chancellor's* Note-book is the following memorandum.

I was of opinion that the plaintiff was entitled to the jewels and other things delivered by the testator, her father, to *Mr. Dunster*, for her benefit as a gift in his lifetime, and that the defendant, the widow, was not entitled to the 1,000*l.* South Sea Annuities, transferred to her by the testator, in prejudice of the marriage articles, but that she ought to have the same, or a satisfaction for them out of the testator's testamentary third of the estate, and decreed an account, with directions accordingly, and a distribution.

His Lordship declared that the jewels and other things given by the testator to the plaintiff, and delivered in a chest to *Mrs. Dunster*, for her benefit, are not to be considered as any part of the testator's personal estate, and that what should appear to be the clear personal estate, after payment of debts, should be divided into three parts; one-third to be retained by the defendant *Isabella* in her own right, by virtue of the marriage articles; another third to be the testamentary part of testator; and the remaining third in moieties, one to belong to the plaintiff, and the other to *Isabella*, the testator's daughter by his second wife.

And his Lordship declared, that the transfer of the 1,000*l.* South Sea Annuities, by the testator to his wife, ought not to take effect in prejudice to the marriage articles, but to be brought into the personal estate before the division be made, and that such transfer ought to be considered as a good gift against the testator, *John Lucas* himself, and that the defendant, *Isabella*, the widow, ought to receive a satisfaction for the 1,000*l.* South Sea Annuities, out of the testator's

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third or testamentary part of his personal estate, so far as that will extend. And doth therefore order that the testator's third part be applied in the first place, to make good to the defendant, *Isabella*, the value of the South Sea Annuities, and the dividends thereof from the death of the testator. The jewels, &c. his Lordship directed to be delivered to the defendant *James Lucas*, for the benefit of the plaintiff. (4)

(4) Reg. Lib. B. 1737. fo. 421. and see *Graham v. Londonderry*, 3 Atk. 392. See *Probert v. Clifford*, post.

ELEANOR DAVENPORT, Widow, one of
the Daughters of MARGARETTA FARMER, Widow, deceased, JOHN DAVENPORT, her Son, and JAMES MITCHELL, PETER LODGE, and RICHARD CHESNEY, Executors of the said MARGARETTA FARMER . . } Plaintiffs; (1).

and

JOHN OLDIS, JOHN BLAKE, RICHARD OWEN, and MARGARET LEE } Defendants.

July 12th, 1738.

1 Atk. 579. *A. devises lands to his wife for life, and after her decease to his son and daughter, John and Margaret, to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue, to his wife in fee. This will not create a cross-remainder, which can only be raised by an implication absolutely necessary, which is not the case here, for the words several and respective, effectually disjoin the title.* (2)

(1) The statement of this case, and Lord *Hardwicke's* judgment are taken from *Atkyns*, the arguments of counsel from Lord *Hardwicke's* Note-book. The statement of the will by Mr. *Atkyns* exactly corresponds with the will as it is stated in Lord *Hardwicke's* Note-book.

(2) Lord *Hardwicke* founded his decision in this case upon *Comber v. Hill*, 2 Str. 969. S. C. Cases temp. *Hardwicke*, 22. and *Williams v. Browne*, ib. 996.; two previous cases

which had been decided by the Judges of the King's Bench when Lord *Hardwicke* was Chief Justice, which had expressly decided the point. But it is now considered that the word "respective" does not disjoin the title. See *Phipard v. Mansfield*, Cowp. 797. *Wright v. Holford*, ib. 31. *Atherton v. Pye*, 4 T. R. 710. *Watson v. Foxon*, 2 East. Rep. 43. and Mr. *Saunders's* note to *Cook v. Gerrard*, 1 Saund. 185. and see *Green v. Stephens*, 17 Ves. 79.

Thomas for 120l., and being also seised in fee of a messuage in the possession of *Margaret Humphreys*, did by will devise the two messuages, with the lands belonging, to his wife, *Margaret Owen*, for her life, and after her decease, to his son and daughter, *John* and *Margaret Owen*, to be equally divided between them, and the several and respective heirs of their bodies, and for want of such issue, to *Margaret Owen*, his wife, in fee, and made her sole executrix: she proved the will, entered on the said messuages, and received the rents till her death in December 1726, having survived her son, *John Owen*, who died an infant unmarried.

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The widow of the testator, after his death, married with *John Farmer*, the plaintiff's (*Eleanor's*) father, and having survived him, made her will, reciting her first husband's will, and devised one moiety of the said two messuages to *Mitchell, Lodge, and Chesney*, in trust for the separate use of the plaintiff, *Eleanor*, her daughter, during her life, and after her decease, to *John Davenport*, the son of *Eleanor* for life, and after his decease, to the defendant, *Richard Owen*, in fee.

The defendant *Margaret*, the daughter of the testator, *John Owen*, married one *Lee* (who is since dead), and the defendant *Oldis*, having paid off *Thomas's* mortgage, took an assignment thereof; and being willing to purchase the *Shropshire* estate of *Lee*, and the defendant *Margaret*, his wife, they by indentures of lease and release in 1732, between them and *Oldis*, in consideration of the sum therein mentioned, granted to him the said premises, and suffered a recovery, and he insists that he has a right to enjoy the same, as standing in the place of *Margaret Lee*, on whom, upon the death of *John Owen*, her brother, the estate descended by survivorship, and that she became entitled thereto by a cross-remainder under the testator's will.

The question was, whether upon the death of *John Owen*, the son, his moiety of the premises came to his sister by survivorship under the testator's will, or whether the remainder in fee to the testator's widow immediately took effect as to that moiety.

The plaintiffs claimed the benefit of their several devises under the will of *Margaretta Farmer*, and brought their bill, in order that the plaintiff *Eleanor* may, on paying her share of the mortgage, have a conveyance of the moiety of the premises, and that she may be let into the receipt of one

DAVENPORT v. OLDIS. moiety of the rent, and that a partition may be made of the said premises, and that she may be quieted in the possession of a moiety thereof in severalty for the plaintiff's benefit.

Mr. Attorney-General and Mr. Browne, for the plaintiffs, contended that there was no express limitation by way of cross remainder, and that the law did not allow of cross remainders by implication in deeds, that the words "several and respective heirs of their bodies" shewed that the testator did not intend, that the heirs of either one of them should take the whole, and that the limitation to the wife for want of such issue, must mean as each of them might die without issue, *reddendo singula singulis*, and cited the cases of *Gilbert v. Witty*, Cro. Jac. 655., and *Comber v. Hill*, 2 Stra. 969., *Williams v. Browne*, 2 Stra. 996., *Windham's case*, 5 Co. 7., *Huntley's case*, Dyer. 326., and 1 And. 21.

Mr. Chute, for the defendants, cited *Holmes v. Meynell*, 4 Leon. 14. pl. 51. 2 Jo. 172., and Raym. 45., and observed that it could not be supposed, that the testator intended to give the inheritance to his wife till after the failure of all his own issue, and that in *Comber v. Hill*, the great distinction relied upon was, that the devisees in tail, and the remainderman, were all grand children, and that in *Williams v. Browne*, the cross remainders were between three.

July 17, 1733. LORD CHANCELLOR.—I am of opinion that the will in this case is not so penned as to create a cross remainder, which, as it is never favoured by the law, can only be raised by an implication absolutely necessary, and that is not the present case, for here the words "several and respective," effectually disjoin the title; his Lordship for this purpose, cited the case of *Comber v. Hill*, in the King's Bench, H. T. 7 Geo. 2. 1733. (2) (3)

(2) *John Holden*, being seized of several lands in fee, devised to his son *Richard*, for his life, with remainder to his issue in tail male, and after his death without issue, he devised the premises among his three grandchildren in this manner, to his grandson *Richard* and *Elizabeth* his grand-daughter, as tenants in common, and to the heirs of their respective bodies, and for default of such issue, the remainder to his grand-daughter *Anne Holden*, in fee; *Anne* married, and afterwards *Elizabeth* died without issue of her body: the question was, whether *Richard Holden* and *Elizabeth* took an estate

in common, with cross remainders to the heirs of their bodies, for then the estate could not vest in *Anne*, but upon failure of issue of both their bodies; or whether this was an estate in common, with remainders to the heirs of their bodies generally, for in that case, one moiety of the estate would vest in *Anne*, who had the remainder in fee, immediately upon the death of either of them without issue. The Court were of opinion, that no cross remainders were created by this devise, but that by the death of *Elizabeth* her moiety went over to *Anne*.

(3) 2 Stra. 969. S. C. *Williams v.*

The only instance wherein this case differs is, that in the case of *Comber v. Hill*, all the devisees were grand-children, in equal degree to the testator, and in this case the devise over was to the wife, who could not claim as heir at law, but yet the presumption of kindness was as strong in favour of a wife, and then this does not differ from the reason of that case.

In the case of *Holmes v. Meynell*, T. Raym. 425., a great stress was laid upon the word "they;" in case they happened to die, then he devised all the premises: nor can there be any case cited, where cross remainders have been adjudged to arise merely upon these words, "in default of such issue," and therefore his Lordship declared, that the plaintiffs, *Eleanor Davenport*, *John Davenport*, and the defendant *Richard Owen*, are entitled to the equity of redemption of a moiety of the premises, on payment of a moiety of the principal and interest on the said mortgage, and that in case either of the plaintiffs, or the defendant *Richard Owen*, should redeem the said premises, then he decreed that a commission should issue, to divide the premises into moieties, one moiety to go to the plaintiffs *Eleanor* and *John Davenport*, and the defendant *Owen*, according to their interest therein, and the other moiety to the defendant *Oldis*, and, after such partition made, he directed proper conveyances to be executed by the several parties. (4)

Lord *Hardwicke* has added the following memorandum to his note of this case.

On considering the case of *Comber v. Hill*, and *Williams v. Browne*, I was of opinion, that there were no cross remainders, and decreed a moiety to the plaintiffs *Eleanor* and *John*.

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367. 2 Str. 969.

Browne, 2 Stra. 996. It seems to have been considered according to some *dicta* in the old cases, that cross remainders could only arise by implication between two. See *Gilbert v. Witty*, Cro. Jac. 655. *Cole v. Levinston*, 1 Vent. 224. But that doctrine is exploded; though to raise cross remainders between more than two, it should seem, requires stronger implication than to raise them between two, *Pery v. White*, Cowp. 777. *Phipard v. Mansfield*, Cowp. 797. *Atherton v.*

Pye, 4 Durn. & East. 710. Harg. & Butler's Co. Litt. b. n. 1., and the cases there cited. Though cross remainders can never be created by implication in a deed, (see *Cole v. Levinston*, 1 Vent. 224.,) yet they may arise by implication in the construction of executory trusts or marriage articles, *Marryat v. Townly*, 1 Ves. 105. *Twisden v. Lock*, Amb. 663.

(4) Reg. Lib. A. 1737. fol. 783.

OLIVER v. TAYLOR.(1)

July 13th, 1738.

1 Atk. 474.

A common recovery suffered in the Court of Common Pleas will not pass copyhold lands, otherwise as to customary freeholds.

If lands are copyhold, a common recovery suffered in the Court of Common Pleas will not pass such lands, but if lands are customary freeholds, and pass by surrender in a borough court, yet a recovery in the Common Pleas of such lands may be good. The case of *Baker v. Wase*, in Lord *Macclesfield's* time, is cited.

(1) This case is taken from *Atkyns*. It appears from the *Lord Chancellor's* note of this case, that the plaintiff, claiming as issue in tail under the will of *Richard Tregeare*, prayed to be admitted to certain customary tenements within the borough of *Launceston*; that the defendants insisted upon a common recovery suffered in the Court of Common Pleas to bar the entail, but which the plaintiff contended could not operate on copyhold lands. Upon the hearing, the *Lord Chancellor* directed three issues to be tried:—1st. Whether the lands in question were copyhold or customary freehold. 2d. Whether by virtue of the custom of the borough or otherwise, such lands are capable of being entailed. 3d. If such lands could be entailed, then whether such entail could be barred by surrender or recovery in the court of the borough, or by a common recovery suffered in the court of Common Pleas at *Westminster*, or by which of those methods.(a)

It appears that all these issues were found for the plaintiff, and that upon the cause coming on again on the 10th of November, 1739, a decree was made according to the prayer of the bill.

It appears by the Register's Book, that the jury found that the lands comprised in the said surrender are customary freehold lands, and by virtue of the custom of *Dunhaved*, otherwise *Launceston*, the said customary freehold lands are capable of being entailed, and that such entail can be barred only by surrender in the court of the borough of *Dunhaved*, otherwise *Launceston*, and not by common recovery in the court of Common Pleas at *Westminster*, and his Lordship directed an account of the rents and profits of the said customary lands, and what was coming on that account to be paid to the plaintiff, and ordered that possession be delivered of the said customary premises, and that he should be admitted as tenant thereof, according to the custom of the borough.(b)

(a) Reg. Lib. B. 1737. fol. 483.

(b) Reg. Lib. B. 1739. fol. 48.

LOMAX v. HOLMDEN and Others.(1)

Appeal from the Rolls..

July 18th, 1738.

THE object of the bill in this cause was to compel a specific performance of an agreement entered into by the defendants, *Marriott* and *Buck*, for the purchase of a certain estate called *Bovington Bury*.

A court of equity does not compel a purchaser specifically to perform his contract for the

purchase of an estate, where the goodness of the title depends upon difficult and doubtful points of law.(2)

Upon a reference to see whether a good title could be made, the Master made a special report, stating that the testator by his will of the 26th December, 1685, after the payment of his debts and legacies, devised all the residue of his lands, comprising the premises in question, to his two sons, *Joshua* and *Thomas*, and their heirs, equally to be divided between them, to hold to his two sons respectively for their lives, without impeachment of waste, and then to their first and other sons in tail; and if both his said sons should die without issue male, or such issue male should die before he or they attained the age of twenty-one years, or had issue male of their body or bodies, then he devised the said hereditaments to his daughter *Elizabeth*, and to his grandchild *Henry Appleton*, and to their heirs, equally to be divided between them. *Thomas Lomax*, one of the sons of the testator, for the purpose of discontinuing all estates tail, before issue born, made a feoffment to *Francis King* of the premises in question, to the use of himself and his heirs, and then contracted with the defendant *Marriott* for the sale

(1) The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book, the judgment from a manuscript report.

(2) And it seems now that though in the judgment of the Court, the better opinion is, that a title can be made, yet if there is [a considerable] a rational doubt, the Court has not attached so much credit to its own opinion as to

compel a purchaser to take the title, but leaves the parties to law, per Lord *Eldon*, *Stapylton v. Scott*, 16 Ves. 274; and see *Shapland v. Smith*, 1 Bro. C. C. 75. *Denne v. Cooper*, 1 Ves. jun. 565. *Sheffield v. Lord Mulgrave*, 2 Ves. jun. 529. *Rose v. Calland*, 5 Ves. 188. *Lowes v. Lush*, 14 Ves. 547, and see *Biscoe v. Perkins*, 1 Ves. & Bea. 485.

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of the estate and died, having devised the purchase money, or if the purchase could not be completed, the estate to his nephew the plaintiff.

Upon this statement of the case, the *Master of the Rolls* was of opinion that the title was good ; that there were no cross remainders by implication ; that the remainders over were not vested but contingent remainders, and consequently destroyed by the feoffment, and accordingly that there was a good estate in fee in *Thomas Lomax*, and decreed a specific performance of the agreement.

From this decree the defendants appealed to the *Lord Chancellor*.

Mr. Browne, *Mr. Weldon*, and *Mr. Clarke* for the defendants.

The first question is, whether there are not cross remainders between the sons ; if there are, it is clear that a good title cannot be made. Another question will be, whether the title is so clearly good that the Court will compel a purchaser to take it.

As to the first, the question arises between tenants in tail, therefore there may be cross remainders by implication ; the testator intended to prefer all his male to any of his female issue ; the devise over to the daughters is only in case both his sons should die without issue, which implies, that if either of his sons left an issue male, he should have the estate. The case of *Holmes v. Meynell*, *Raym.* 452, was not so strong as this.

Secondly, This is not such a title as a purchaser can be compelled to take. An infant, the child of the testator's daughter, claims this estate, and he cannot be bound till he comes of age. It is sufficient if the case is far from being clear.

Mr. Attorney-General, *Mr. Fazakerley*, and *Mr. Floyer* for the plaintiff.

The testator has expressly given estates for life to his sons, and estates-tail to his grandsons. The words, "if both sons die without issue male," cannot be construed to be words of limitation, but descriptive of the sons before mentioned, and cannot be construed so as to enlarge the estate of the father.

That this is the true construction appears from the words following :—"If such issue-male should die before they have attained twenty-one, or had issue-male of their bodies." In *Holmes v. Meynell*, there was the word "issue." In *Comber*

v. Hill, 2 Stra. 969. the Court shewed an inclination not to favour cross remainders.

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It is said that if the question be only doubtful, the purchaser ought not to be compelled to accept the title: but if the Court determines now that the purchaser need not complete his purchase, it will in effect determine that the estate shall never be sold.

LORD CHANCELLOR.—The single question is, whether in this case I ought to compel the purchaser to proceed in his purchase, and accept a title depending upon many doubtful questions of law. July 18, 1738.

These questions depend upon the construction of the will, and the operation of the feoffment. The first question is, whether there is an estate-tail by implication in the sons.

It has been held that an implication should not enlarge an express estate, but in that case there was no other but an estate for life. Here the devise begins with words of inheritance, "them and their heirs." But if there be an estate tail in the sons, the next question will be, whether there are cross remainders to them by implication; for if there are, the feoffment will be no bar, the remainders being vested. There are some strong cases of such remainders between children, founded upon the supposed intent, and the word both is very material. But whether there be cross remainders or not, the next question will be, whether the remainders to the daughters are vested or contingent; for if vested, these are not barred by the feoffment. If the words had been, "if my sons shall die without issue," the remainder over would be vested, but the words "before twenty-one, and without issue," create the doubt: a Court of Law would be strongly inclined against construing these remainders to be contingent after an estate tail before given, for such a construction would put all the remainders in the power of the tenant for life.

It is not necessary for me to determine these points, I am inclined to think with his Honor upon the whole, that there are no cross remainders, but contrary to his opinion as to the last remainders being contingent, and consequently on the operation of the feoffment, but I give no opinion, because I think that in such a case as this, the Court ought not to compel a purchaser to accept a title depending upon such reasonable doubts.

If these had been only doubts which the Court could have cleared, or if the doubts had depended upon facts which

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might have been ascertained, or if there had been long terms which might have protected the purchaser, I should not have thought it sufficient to have let him off, but as it is discretionary in the Court to decree specific performances, I think that this is a case in which it ought not to be done. The consequence is not that the estate will never be sold, but that it will not be sold for so much.

To the note of this case, Lord *Hardwicke* has added the following memorandum :—

As to the point of cross remainders, I was inclined to be of the same opinion with the *Master of the Rolls*, that there were none ; but as to the question whether the feoffment had barred the remainders to *Elizabeth*, the testators daughter, and his grandson *Henry Appleton*, I inclined to think that the remainder was vested, and consequently not barred by the feoffment, but I did not give any absolute conclusive opinion upon those points of law, but thought them so doubtful, that it being discretionary in the court whether to execute contracts specifically ; it was unreasonable to compel the purchaser to proceed and pay his purchase money, when the title was liable to so much doubt on difficult and intricate points of law, which might admit of great variety of opinion.

The parties acquiesced in this opinion, and by consent of *Buck*, the purchaser, and *Marriott*, his trustee, and of the plaintiffs in the cross cause ; the cross bill, as against *Buck* and *Marriott*, was dismissed without costs.

The decree is, his Lordship doth declare, that he is of opinion, that it is not reasonable on the circumstances of this cause, to compel the purchaser to complete his purchase, and by the consent of the defendant *Buck*, the purchaser, and the defendant *Marriott*, his trustee, and also by consent of the clerk in Court of *Holmden* and *Buck*, the plaintiffs in the cross cause, his Lordship doth order that the cross bill, as to defendants *Buck* and *Marriott*, be dismissed without costs, without prejudice to any proceedings to be had by any of the parties to these suits, either in these causes or by way of new bill for an execution of the trusts in the will of the said *Caleb Lomax*, and it is ordered that *Buck* take back the sum of 20*l.* deposited by him with the Register. Reg. Lib. B. 1737. fol. 489.

Ex parte LE COMPTE. (1)

August 1st, 1738.

IN the year 1720, the petitioner gave 300*l.* for an annuity of 30*l. per annum*, for her life, payable out of the estate of the person who is now a bankrupt, which he not being able to pay her by reason of the commission, she petitioned to be admitted a creditor for the whole 300*l.*

1 Atk. 251.
C. in 1720, gave 300*l.* for an annuity of 30*l. per ann.* for her life, payable out of a persons estate, who becomes a bankrupt in 1738. Commissioners directed to settle the value of her life, and C. to be admitted a creditor for such valuation, and the arrears of her annuity, and not for the whole 300*l.*

LORD CHANCELLOR ordered, that it be referred to the commissioners to settle the value of her life, and that she be admitted a creditor for such valuation, and the arrears of her annuity, it being unreasonable she should have the whole 300*l.* when she had enjoyed the annuity eighteen years.(2)

mitted a creditor for such valuation, and the arrears of her annuity, and not for

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.

(2) Ex parte *Belton*, 1 Atk. 252. Ex parte *Artis*, 2 Ves. 490. *Perkins v. Kempland*, 2 Black. 1106. *Wyllie v. Wilkes*, Doug. 501. See *Fletcher v. Bathurst*, 7 Vin. 71. pl. 4. *Cotterel v. Hooke*, Doug. 93. Ex parte *James*, 5 Ves. 708. Ex parte *Whitehead*, 1 Meriv. Rep. 127. But by 6 Geo. 4. c. 16. s. 54., it is enacted, that any annuity creditor of any bankrupt by whatever assurance the same be secured, and

whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission, and see the 56th sect. of the same act, as to the proof of contingent debts.

PURSE v. SNABLIN.

ROBERT PURSE Plaintiff; (1)

and

ROBERT SNABLIN and ANN SNABLIN,
 now the Wife of CHARLES TOWNSEND, } Defendants.
 Infants }

ROBERT SNABLIN, an Infant Plaintiff;

and

ROBERT PURSE, RICHARD WARD and
 ANNA MARIA his Wife, FAIRBEARD } Defendants.
 SWYNBURNE, and SUSANNAH his
 Wife, and ANN SNABLIN, the Infant . }

*Appeal from the Rolls.**June 17th, and 12th October, 1738.*

1 Atk. 414. ROBERT ROWLAND, on the 23rd of February, 1734, made his will in the words following:—

Robert Rowland, by his

will, after stating that he intends to dispose of his estate, gives his real estate and two several legacies to his nephew, *Robert Snablin*, and then gives to his niece *Anna Maria Snablin*, 3,000*l.*, also to his niece *Ann Snablin*, 5,000*l.* in the Old Annuity Stock of the South Sea Company; *Item.* 3,000*l.* in the New Annuity Stock of the South Sea Company; *Item.* To his cousin *Robert Purse*, 5,000*l.* in the Old Annuity Stock of the South Sea Company; and after other bequests, gives the residue of his real and personal estate to his nephew *Robert Snablin*, and appoints *Robert Purse*, his executor; at the times of making his will and of his death, the testator was possessed of only one sum of 5,000*l.* in the Old Annuity Stock of the South Sea Company; held that the two legacies of 5,000*l.* in the Old South Sea Annuity Stock are not specific legacies in the strict sense of the term, but are separate and distinct legacies, to be made good out of the personal assets of the testator. (2)

(1) The statement of this case, and the arguments of counsel, are taken from the papers in the cause, and Lord *Hardwicke's* Note-book; the judgment of the *Master of the Rolls* from a manuscript report, and that of Lord *Hardwicke* from a manuscript in his lordship's handwriting.

(2) The Court leans against considering legacies specific because of the consequences, per Lord *Hardwicke*, *Ellis v. Walker*, Amb. 310. *Chaworth v. Beech*, 4 Ves. 565., sometimes pressing hard upon the specific legatee, who finds nothing to answer the description, sometimes upon other legatees in case of a deficiency; unless the intention to make them specific be clearly expressed; as where the sum of 6,000*l.* South Sea Stock was given to trustees to sell and

apply the money arising therefrom in the purchase of lands to be settled according to the directions of the will; *Ashton v. Ashton*, Cases Temp. Talb. 152. S. C. 3 P. Wms. 384., [Sir *Wm. Grant* is reported to have said that *Ashton v. Ashton* had been over-ruled by modern decisions, *Wilson v. Brown-smith*, 9 Ves. 180., but it seems there is no decision which has over-ruled that case, and it has been supported by Lord *Hardwicke* in the present case, who said it would be highly absurd to suppose that the testator intended to direct his executor to lay out his money in buying stock in order to sell again and turn it again into money immediately; and it has been supported in *Simmons v. Vallance*, 4 Bro. C. C. 345.] Or where there is a devise of lands to

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"I *Robert Rowland* being weak in body, but of sound mind, do hereby make my will, and dispose of my estate in manner following, viz. first I give and devise to my nephew, *Robert Snablin*, and his heirs, all my freehold and copyhold estates, situate in the *Isle of Ely, Friday-street, London*, and in or near *Five Foot Lane*, in *Surry*, or any where else. And I give to my said nephew *Robert*, 2,500*l.* in the Bank Stock, and 1,500*l.* in the East India Stock.

Item, I give to my niece *Anna Maria Snablin*, 3,000*l.*

Item, I give to my niece *Ann Snablin*, 5,000*l.* in the Old Annuity Stock of the South Sea Company.

Item.—I give to my niece *Susannah Swynburne* 3,000*l.* in the new Annuity Stock of the South Sea Company.

Item.—I give to my cousin *Robert Purse*, 5,000*l.* in the old Annuity Stock of the South Sea Company.

Item.—I give to my servants, *Joseph Ambrose* and *Sarah Spratley* 30*l.* a-piece, and I give to Mr. *Wenham* and his wife, of *Ely* 5*l.* a-piece; the rest and residue of my estate both real and personal, I give, devise, and bequeath to my

trustees to sell for a given sum, and to divide the sum arising from the sale, amongst different legatees, *Page v. Leapingwell*, 18 Ves. 463; or where there is a bequest of 2,000*l.* the balance due to the testator from his partner, if the testator did not draw it out of trade before he died, *Ellis v. Walker*, Amb. 309., and see *Cooper v. Martin*, ante, p. 442. Or where there is a bequest of a debt or a security, *Lord Castleton v. Fanshaw*, 1 Eq. Ca. Ab. 298. pl. 2. *Drinkwater v. Falconer*, 2 Ves. 623. *Ashburner v. Macquire*, 2 Bro. C. C. 108. *Chaworth v. Beech*, 4 Ves. 555. *Innes v. Johnson*, ib. 568.; but the gift of a sum due on a given security, or in a particular fund, is a general legacy called a demonstrative legacy, as merely pointing out the fund out of which it is to be paid, *Savile v. Blacket*, 1 P.Wms. 777. *Attorney-General v. Parkin*, Amb. 566., which though considered as a slender distinction by Lord *Thurlow* in *Ashburner v. Macquire*, 2 Bro. C. C. 111., has been sanctioned by subsequent decisions, *Roberts v. Pocock*, 4 Ves. 150. *Kirby v. Potter*, ib. 748. *Wilson v. Brownsmith*, 9 Ves. 180., and see *Gillaume v. Adderley*, 15 Ves.

384. *Smith v. Fitzgerald*, 3 Ves. & Bea. 2. *Mann v. Copland*, 2 Madd. Rep. 223. *Fowler v. Willoughby*, 2 Sim. & Stu. Rep. 355. A legacy of 2,000*l.* 4 per cent. Bank Annuities is not specific, *Wilson v. Brownsmith*, 9 Ves. 180. *Webster v. Hale*, 8 Ves. 410. But a legacy of "my stock" or "in my stock," or "part of my stock," or of "stock standing in my name," is a specific legacy, *Ashburner v. Macquire*, 2 Bro. C. C. 108. *Kirby v. Potter*, D. Lord *Alvanley*, 4 Ves. 748. *Barton v. Cooke*, 5 Ves. 461. *Evans v. Tripp*, 6 Madd. 91.; though a legacy of 1,000*l.* out of my Reduced Bank Annuities 3 per cent. within one month after my decease, *Kirby v. Potter*, 4 Ves. 478.; and a legacy of all my stocks, which I may be possessed of at the time of my decease, *Parfott v. Worsfold*, 1 Jac. & Walk. Rep. 594., or the bequest of 50*l.* for a ring, *Apreece v. Apreece*, 1 Ves. & Bea. Rep. 364., are general legacies. A legacy may be a general legacy attended with an appropriation upon part of the property, per Lord *Alvanley*, D., *Raymond v. Brodbell*, 5 Ves. 208., and see *Acton v. Acton*, 1 Meriv. 178.

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The testator died in the month of March 1734, and at the time of making his will and of his death was possessed of the sum of 5,000*l.* in the old Annuity Stock of the South Sea Company and no more.

In Trinity Term 1735, *Robert Purse* filed a bill against *Robert Snablin* and *Ann Townsend*, then *Ann Snablin*, claiming his legacy of 5,000*l.* old South Sea Annuities.

Ann Snablin by her answer also claimed her legacy of 5,000*l.* Old South Sea Annuities. *Robert Snablin* by his answer insisted, that only one sum of 5,000*l.* old South Sea Annuities was payable, being the whole of what the testator was possessed of in that fund.

Robert Snablin also filed a cross bill for the direction of the Court as to these legacies.

A decree having been made at the *Rolls*, for the purpose of taking the necessary accounts; the Master, reported that the personal estate of the testator was sufficient to pay all the specific and other legacies.

These causes coming on again upon the Master's report, his Honour, on the 22nd of December 1737, delivered his judgment as follows.

The single question in this case is, whether two sums of 5,000*l.* are devised. How would this be in a devise of lands at common law, for some argument may be drawn from laws by parity of reason, although they do not actually govern the case. It is said *arguendo* in *Plowden*, *Paramore v. Yardley*, that where the same lands are devised to two persons, the last devise is a revocation of the first; but that is not law, for in Cro. El. 9, and Yelv. 209, it is said that they are joint tenants, and so I take it that they are, and not tenants in common, for the intent is that they should both take the whole.

The intent is the same in lands and in personalty. Where the same thing is given in two clauses, it is the same thing as if it had been given in one, for a will is an instantaneous act.

But the case before us is to be judged by the Ecclesiastical law which governs in legacies, and which is a compound of the civil and canon law under the allowance of the common law, for it binds not, either as civil or as canon law.

We need not, I think, go any further than *Swinburne*, who is a very good authority to determine this point. See

Swinb. 4th Ed. 454. Domat Dr. Strahan's, Ed. 191, and the cases there cited.

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It is objected that the testator does not say my South Sea Annuities, but joining the subject matter, he says the same thing. In the preamble of the will he says, I devise my estate in manner following, and the words, I give, necessarily imply something which he had to give, and in all the other devises it turns out to be so.

As to its being to be made good out of the residuum; Swinb. 137. is in point for the defendant.

Perhaps at the time he made his will, he intended to purchase more stock; and if he had done it, it would have been good for both, but as he has not done it, the consequence is, that he either altered or did not complete his intention. I admit, that upon the face of the will a supposition arises that he had stock to satisfy both devises, but the fact being otherwise controuls that supposition. It is a strange notion to suppose a legacy partly specific, and partly pecuniary. If the testator thought that he had two sums of 5,000*l.* South Sea Annuities, and in fact had but one, it is plain from *Swinburne*, that one only passes; and can any one conceive that he would have devised as he has done in this case, if he had known that he had but one, and did not intend to purchase more?

In *Ashton v. Ashton*, Lord *Talbot*, went upon the nature of the legacy which he held to be clearly specific.

In *Partridge v. Partridge*, the question was whether a sale of the stock was an ademption of the legacy, and the legacy was held not to be specific, for this reason; because it was impossible to take a specific 1,000*l.* out of a mass of 1,600*l.*, and Lord *Talbot* said that there were some things so specific that they can be satisfied by nothing else; but stocks though specific, are not so, and accordingly decreed it no ademption.

In all other parts of the will he has given nothing but what he had. He must be considered as having done so in this, and all the authorities agree that the legatees must divide it between them.

His Honour decreed that but one 5,000*l.* old South Sea Annuities passed by the will, and that the 5,000*l.* old South Sea Annuities, which the testator had at the time of his death, and the interest grown due since his death must be divided between *Robert Purse* and *Ann Snablin*, and directed the necessary transfers.

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From this part of the decree, *Robert Purse* and *Ann Snablin*, now the wife of *Charles Townsend*, jointly appealed, claiming to have 5,000*l.* old South Sea Annuities, each made good to them out of the testator's personal estate.

Mr. Attorney-General, *Mr. Fazakerley*, and *Mr. Clarke* for the appellants.

There are two questions,

First, What the testator's intention really was?

Secondly, Whether that intention can take effect?

The intention is clear that each legatee should have 5,000*l.* Each bequest begins with the introductory word, Item. It is the same as if he had said, I give to each of them, *Ann Snablin* and *Robert Purse* 5,000*l.* old South Sea Annuities. But it is said that this intention, however plain, cannot take effect, because the testator was not possessed of that which he affects to give. But he does not pretend that he was possessed of it; he does not give my South Sea Stock, but 5,000*l.* South Sea Stock generally. A legacy of 5,000*l.* in money is good, although the testator does not leave one shilling in specie. Lands pass by a will, but a will of personal estate is only a direction to the executor in what manner to dispose of the personal estate, the whole of which is vested in him. Here he has directed him to transfer 5,000*l.* South Sea Annuities to each of the legatees. Testators frequently give rings, and the executor is bound to procure them.

If the testator had had no stock at all, there would have been no question. The testator might have intended to purchase more stock in his lifetime, why may not the executor do it for him? A devise of quantity is never held to be specific. Swinb. part 3, sect. 5, because the executor may go to the market and buy it.

So it is of things consisting in number, although some part be extant amongst the testator's goods, Swinb. part 7, sect. 10.

Mr. Idle and *Mr. Wilbraham* for *Townsend* and his wife, late *Ann Snablin*.

The two legatees cannot be joint tenants of the 5,000*l.* South Sea Stock, of which the testator was possessed, because the legacy is not specific; and the only case in which two legatees are considered as joint tenants is where the thing given is single and specific; and where there cannot be two of the same kind, Cro. El. 9. Yelv. 209. Cro. Jac. 290. If a testator having two daughters gives 500*l.* in jewels to

one, and 500*l.* in jewels to the other, and has only 500*l.* worth of jewels, must not jewels be purchased for the other?

Mr. *Browne*, Mr. *Hamilton*, Mr. *Waller*, and Mr. *Murray*, for the defendant *Robert Snablin*.

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It is clear that the testator intended to give the particular stock which he had and no more, and that these legacies are specific. He begins his will by declaring his intention to dispose of his estate not to give any thing which he had not. It is said that he does not use the words my stock, but the word my is not used in any of the other bequests of stock.

If the estate had been deficient to pay all the legacies, could the pecuniary legatees have insisted upon this 5,000*l.* stock being applied to pay them; but if the first bequest to *Ann Snablin* is specific, the other to *Robert Purse* must be so too, for they are in the same words. If the assets should not extend to pay both, which is to keep the specific thing, and which to abate? Money in stock is only a particular sum, lent upon a particular security, it is like a bequest of money in a particular place. If the testator intended to confer a benefit to a particular amount, and not to give a specific part of his property vested in a particular stock, why should he wish the money given to be invested in stock, which is of so fluctuating a value, and which not being settled, the legatee might immediately reconvert into money. If the testator had no South Sea stock, the case would have been different, because there would be no room to suppose that the testator had made a mistake. The cases in *Swinburne* are of things consisting only of quantity without any expression pointing out any thing specific. In *Ashton v. Ashton*, 22 Nov. 1735, the testator gave 6,000*l.* South Sea Annuities to his executor, in trust that he should sell and dispose of the same, as soon as might be after his decease.

The testator had only 5,350*l.*, and it was held that the sum should not be made up by the executor; the Lord Chancellor saying that it was plainly the testator's intention to give only the stock which he had.

In *Partridge v. Partridge*, 27th November 1736, Lord Talbot declared that there was a difference between the cases where the testator had, and where he had not the thing given, that in the latter case the executor must purchase.

LORD CHANCELLOR.—The general question upon this appeal is whether the two legacies of 5,000*l.* in the old South

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Sea Annuities, the one given to the testator's niece, *Ann Snablin*, and the other to his cousin, *Robert Purse*, are to be considered as gifts of the same sum or quantity of 5,000*l.* in South Sea Annuities, or of different sums or quantities in that fund.

If they are to be taken as gifts of the same sum or quantity of South Sea Annuities, then it has not been disputed at the bar on either side, but that the consequential direction given by the decree which has been made at the *Rolls*, for dividing that sum equally between the plaintiff *Purse*, and the defendant *Ann Snablin* is right; but if these two legacies are to be taken as distinct gifts of two several sums or quantities of 5,000*l.* in old South Sea Annuities, then the foundation of this decree totally fails.

In order to determine this question, the first and principal thing to be taken into consideration is the *intention of the testator* expressed in his will.

And of this I can conceive no doubt. He has declared his mind in plain words, "that he gives 5,000*l.* in the old Annuity Stock of the South Sea Company to the one, and afterwards that he gives 5,000*l.* in the old Annuity Stock of the South Sea Company to the other.

Did the testator intend to give that entire sum to *Ann Snablin* the first legatee when he wrote or dictated that clause which stands prior in his will? I believe this will not be denied. How *then* can it be disputed whether when he wrote or dictated the second clause he did not mean the same thing by the very same words?

To avoid the force of this, two different ways of arguing have been used on the side of the residuary legatee which happen to be inconsistent with each other.

The first was, that the testator being possessed of no more than 5,000*l.* old South Sea Annuities, intended only to dispose of what he had, and either mistook the quantity he was possessed of, or else had forgot that he had given it away by the former clause; but when a man has expressed himself in his will in plain words *mistake* or *ignorance* of the nature of his estate, or of the circumstances of his affairs, is never to be presumed, if by any construction a reasonable consistent meaning can be found out.

Here the difference is so great between the quantity whereof he was possessed, and what is given, that it is highly improbable, nay almost impossible, that a man whose circumstances lay in so narrow a compass as the testators

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appear to have done, could be so widely mistaken. Indeed, if a man devises certain lands by a particular description, or gives any other particular specific thing as his own, which he hath not, that is clearly a mistake, or perhaps a mark of insanity, or that he designed to amuse, or put a jest upon the legatee; as it is said in the digest, *magis derisorium est quam utile legatum. Dig. De legatis et fidei commissis, Lib. 1. leg. 71.* But this is never said but from necessity, and where there is no possibility of avoiding it.

As the testator is not to be charged with *mistake* or *ignorance* of his circumstances, neither shall he with *forgetfulness* of himself or his own acts, unless from the necessity of the case. Thus when he gives the same land by name, or the same individual chattel twice over in his will, it is difficult to account for it but from *forgetfulness*; but no case, authority, or opinion has been produced where that has been held upon a legacy consisting in quantity or number only. But if in any such case that might be admitted, yet to do it here would be the greatest strain that ever was made. The latter legacy follows so close upon the heels of the former, scarce two lines in the will intervening, that there is hardly room for a possibility of his forgetting the first. A man of *understanding* and *memory* sufficient to make a testament, as this person must be allowed to be by his will being proved, cannot be presumed so soon to have forgot it.

The other answer offered was that the testator *intended* by the second clause to give the very same 5,000*l.* South Sea Annuities to *Robert Purse*, which by the first he had given to *Ann Snablin*, in order to make them joint-tenants, that the one might take one moiety, and the other the other moiety.

This, (as I said before,) is inconsistent with the other way of accounting for it, for *mistake* of the quantity, or *forgetfulness* of the former bequest, do *both* of them exclude any actual intention to divide the same sum of 5,000*l.* South Sea Annuities between them; the supposition of such an intention makes him know what he was doing, and yet makes him guilty of the greatest absurdity of all.

Would any man who had just before given the whole sum to one person, and then immediately change his mind so as to intend to give one-half of it to another person, have expressed that by giving the whole to the last? it is next to an impossibility that he should; he would either have varied

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the first clause, or else had his will transcribed over again, or else have said, my will is, that *Robert Purse* shall have one-half of the 5,000*l.* old South Sea Annuities, which I have before given to *Ann Snablin*, or have used some expression to that effect.

This is one of those things which are so obvious that the fact, and the natural turn and operation of any man's mind speak it plainer than any argument or comment can do.

After having said thus much, I shall take it clearly to have been the testator's intention to give the full quantity of 5,000*l.* old South Sea Annuities to *Robert Purse*, and then the next consideration will be, whether, upon the words of this bequest such intention can have effect.

Now there can be no rule or principle more certain in the construction of wills that such exposition ought to be made, as that every clause, nay, every word contained in them shall have effect and be fulfilled, if that can be attained consistently with the rules of law.

Let it be enquired then what rule of law stands in the way in the present case.

Nothing can be more free and unrestrained than that power which a man has to dispose of his personal estate; it is larger than that which the law of *England* gives him over his real estate; for as it enures not as a grant or conveyance of the thing, but as a direction to the executor how to administer his effects after his death, he may give even that which he is not possessed of at the time of making his will, and dispose of it in what shape he pleases.

1st objection.

But to this it is objected, that both at the time of making his will, and at the time of his death he had no more than 5,000*l.* old Annuity Stock, and the will must be understood relatively to what he had at the one period or the other, and therefore both the legatees can only have that sum divided between them.

Answer.

It was observed in the argument of this case that the testator has not in either clause described the Annuities by the word *my* or any other word denoting either a property or possession of those Annuities in himself, and therefore did not intend so to confine it, and though this observation was treated as being of little weight, and certainly in many cases is too slight to deserve any stress, yet as this case is circumstanced, it may be considerable.

The civil law lays great stress on the use or omission of this word in legacies, *Dig. de legatis et fidei commissis, lib. 3.*

l. 71. *De verbo suum; cum suæ ancillæ sive servi in testamento scribuntur, his designari videntur quos Paterfamilias suorum numero habuit. Eadem in omnibus rebus quas suas quis legaverit dicenda sunt.*

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This is followed by other texts to the same purpose, and so is *Domat Eng. Tr. vol. 2. p. 159.*

Not that the use of this or that particular word is necessary, for if by any description, intimation, or hint in the will, it appears that the testator intended to give only out of the particular fund or quantity whereof he was or should be possessed at his death, that may confine it; but where nothing of that sort appears, but his words are express, that the legatee shall have the goods bequeathed, it may take effect as an injunction to his executor to purchase or procure those goods for the legatee, at least so far as they are not found among his assets, which is a *proper will*, because it is a direction in what manner he would have his personal estate administered and applied after his death.

It was said indeed by the counsel for the residuary legatee, that this will is penned in as strict a manner as if it had been said *my old Annuities*, but it is introduced with the words *I dispose of my estate*; but that does not by any means amount to the same as describing *the thing* particularly given by the word *my*; because whether the legacy is to take effect out of the specific *goods* whereof the testator is possessed, or by purchase of the executor out of his assets at large, it is equally, both in reason and propriety of speech, a *disposition* of his estate.

The consequences from hence is, that these legacies to *Ann Snablin* and *Robert Purse* may very consistently with the rules of law take effect as directions to the executor to purchase so much old South Sea Annuities, in order to perform them, so far as the quantity he had was deficient.

For this there are many authorities in the books of civil law, which in cases of mere personal legacies, as this is, so far as that law has been received and allowed in *England* must be the rule, *Swinb. part 7. sect. 24*, the last in the book, has these words; where the legacy is *general*, or *consisteth in quantity*, as when the testator doth bequeath a horse or an ox, not this horse or that ox, or when he bequeaths certain quarters of wheat or other grain, not this or that grain lying in such a barn or garner, this kind of legacy cannot perish, though all the testators cattle do

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perish, and all his corn be consumed, and therefore the legatary may recover his legacy.

This passage seems to suppose that testator once had the thing bequeathed, but in another place, he in terms excludes that; *part 3, sect. 6, page 179 of the last edition*; he says, concerning goods, if the testator do bequeath any such thing in general terms, as a horse or an ox, although he has neither horse nor ox *at the time of his testament made, neither yet at the time of his death*, the legacy is not therefore void, but the executor is bound to deliver a horse or an ox.

In sect. 5. of the same part, p. 173, he puts a much stronger case than any of these where the same point of law is affirmed.

He says not only that thing may be devised or bequeathed by the testator which is truly extant, or hath an apparent being at the time of making the will, or the death of the testator, but that thing also which is not in *rerum natura* whilst the testator liveth; therefore it is lawful for the testator to bequeath the corn which shall be sown, or grow in such a soil after his death, or the lambs which shall come of his flock of sheep the next year, depasturing in such a field; but if there shall be no such corn growing in that soil, nor any lambs arising out of that flock, then the legacy is of no effect, because no such thing at all is extant as was bequeathed; but if the testator devise a certain quantity of grain, or number of lambs, as for the purpose, twenty quarters of corn, or twenty lambs, and doth will and devise that the same shall be paid out of the corn which shall grow in such a field, or arise out of his sheep depasturing in such a ground, *though not so much or no corn there grew, or not any, or not so many lambs there arise*; yet nevertheless the executor is compelled by law to pay the whole legacies entirely, because the mention of the soil and of the flock was rather by way of demonstration than by way of condition; rather shewing how or by what means the legacy might be paid, than whether it should be paid at all. With these opinions agrees, Domat. vol. 2. lib. 4. of Legacies. tit. 2. sect. 3. No. 18, 19, and 21.

The whole of this is grounded upon express texts in the civil law relating to legacies consisting of quantity or number, many of which are put in the Digest, lib. 33. tit. 6. *De Tritico, Vino, vel Oleo legatis leg. 3. Si cui vinum sit lega-*

tum centum amphorarum, cum nullum vinum (testator) reliquisset : vinum hæredem empturum et præstaturum.

Domat in observing upon this text, says, if the legacy were of a certain quantity of corn without determining whence it should be taken, the quantity would be due although there were no corn in the inheritance, in the same manner as a legacy of a sum of money which would be equally due whether there were any money in the succession or not.

To the same purpose, *Mysingerus* in his *Apotelesma* or *Scholia* upon *Justinian's Institutes*, Lib. 2. tit. 20. De *legalis, sect. Si Generaliter. Venio ad legatum tertii generis earum scilicet rerum quæ numero pondere mensurâve limitantur. Et si quidem tale legatum sit, puta aliquod pondus olei, aut olei boni, non adjectâ qualitate prorsus specificatâ, hoc est optimi; tunc hæredis est electio non legatarii.*—Et valet ejusmodi legatum; etsi nihil earum rerum testator reliquerit, teneturque hæres aliunde emere et legatario offerre—Communicabilis enim qualitas, quæ in hujusmodi rebus est, tale legatum conservat. Nisi forte testator de rebus propriis senserit, ut qui dixerit, Vini mei amphoras decem, vel frumenti MEI viginti corbes Titio do, lego. Tum enim non alia vel vina vel frumenta debentur, quam quæ in defuncti patrimonio reperiuntur.

Here by the way you may observe that great stress is laid on the distinction between the testator's leaving or bequeathing the *quantity* generally, and his restraining it to, and describing it as being *his own* by the word *my*.

But what I chiefly cite this author for is that he lays down the reason of the determinations upon legacies of this kind with peculiar clearness. That the communicableness of things of this nature, whereby he means their being vendible and the subject of traffic and generally to be had at a market price, supports such legacies.

Why may not the same rules hold as to stocks? They are indeed a new kind of property introduced amongst us in the last age, but then men's wills and instruments are always to be construed according to the condition and circumstances of times and things, under which they are made; and stocks are as changeable and fluctuating; one parcel of stock as like and as equal to another; they are as much the subject of traffic, and as easy to be bought at market by an executor to enable him to perform the will, as any

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of the *species* mentioned in the books, which I have cited.

Indeed if the surplus of the estate over and above the particular legacies would not have held out to purchase sufficient to make up these legacies, that might have been a strong objection. But the case is entirely delivered from this difficulty by the *Master's report*, which expressly certifies that the personal estate left by the testator at his death was more than sufficient to make good all the specific and other legacies given by his will

If that be so surely all his legacies ought to be satisfied. Suppose the testator had given 5,000*l.* in money to *Robert Purse*, and had died possessed of no ready money, but had left sufficient in South Sea Annuities to answer it, the South Sea Annuities must undoubtedly have been turned into money to make good that pecuniary legacy; and let any man shew me a substantial reason why in like manner his money or other assets should not be turned into South Sea Annuities to make good these legacies of annuities.

2nd Objection.

Another objection, and that principally relied on, was, that the bequest to *Robert Purse* is a *specific legacy*; and therefore, if the thing given be not found amongst the assets the legacy fails.

In order to examine this objection to the bottom, it is necessary to consider and settle the notion of a *specific legacy*.

Now it seems to me that there are two kinds of testamentary gifts that pass with us under the name of *specific legacies*.

The first of a particular individual chattel or thing specially described and distinguished from all others of the same kind: as, *my grey horse*, *my signet with arms*, &c.

The other is, when some goods of a particular kind or *species* are given which the executor may pay or satisfy by delivering the like quantity or value of that kind or *species* to the legatee as a horse, or an ox, such a quantity of wheat, or such a number of sheep, &c.

The first of these is what is *strictly* and most commonly meant by the term *specific legacy*, though perhaps that term considered *critically* and according to the *original force* of the words may not be very correct, for it is more properly an *individual legacy*; this is confessed by *Mynsingerus*, in the book and section already mentioned which is cited by Mr. *Swinburne* in his Margin.; but I

consulted the original book and the words are :—*Species jurisconsultis est quod Individuum Dialectici appellant, ut Davus, Bucephalus.*

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The lawyers call that a species which logicians call an *Individuum*, and the like observation is made by *Vinnius*, in his commentary on the same text of the Institutions, lib. 2. *De legatis* tit. 20. sect. *Si generaliter* :

It must be admitted that if *such a gift* be made, and the thing be not to be found, the legacy fails ; or if it be given in one part of the will to *A.* and in another to *B.* they must take it between them, unless the latter clause imports a revocation of the former ; for it was truly said, that those cases of construing the two legatees to be *joint-tenants* are where the thing given is individual and single ; and there cannot be two of them. In these cases also if the *thing* be disposed of by the testator or perish in his lifetime, it is an ademption of the legacy, and the executor is not bound to supply it.

To affirm that this gift of 5,000*l.* in Old South Sea Annuity Stock to *Robert Purse* is a *specific legacy* in this sense is merely to beg the question, and take the matter in dispute for granted ; for it is the same thing as to say that it is a legacy of the individual sum of 5,000*l.* Old South Sea Annuities whereof the testator was possessed which is the very point to be proved. In order to determine that, you must first settle what is the true construction of the words of the will, and what was the intention of the testator, out of all which it must result, whether it be a specific legacy in this sense or not. But to set out with saying that it is a *specific legacy* is beginning at the wrong end. It is to begin with the conclusion without establishing the premises from whence that conclusion is to be inferred.

But by what I have already said upon the penning of this will and the apparent intention of the testator, I think I have shewn that this gift is not confined to the same individual sum of Old South Sea Annuities whereof the testator was possessed and consequently that it cannot be a specific legacy in this first sense of the *term*.

The other sort of specific legacy which I mentioned, is when goods of a particular kind or species are given which the executor may pay or satisfy by delivering the like quantity or value of that *kind* or *species* to the legatee as

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That if a man being possessed of stock bequeaths it, and afterwards sells out part and dies without purchasing any more stock, this might be looked upon as an ademption, pro tanto; but if at the time of the will made the testator had no such stock this would be a direction to his executors to purchase so much stock for the legatee.

In consequence of this declaration he decreed the 1,000*l.* South Sea Stock to be made good to the legatee.

The latter part of this opinion is an authority in point, that if in the case now in judgment, the testator had had no Old South Sea Annuities at all, the executor would have been obliged, out of the gross of the estate, to purchase a sufficient quantity, and transfer them to the legatee, that if instead of giving him 5,000*l.* Old South Sea Annuities he had given him 5,000*l.* in South Sea Stock or in any other stock of which he had not one shilling, the executor must in like manner, have purchased it for the legatee, all this was admitted in arguing this case at the bar; and for my own part I cannot see a shadow of difference in reason, between the two cases, supposing the objections of *mistake* and *forgetfulness* are already answered.

I come now to consider some particular objections, which were made on the part of the residuary legatee, *viz.*

1st Objection.

That it appears by the Master's report, that in other legacies of stock, the testator has given sums exactly equal to what he was possessed of, and from thence it was inferred, that he intended in this instance to give only the 5,000*l.* old annuities which he had.

But I think this rather turns the other way, for it shews he was perfectly conusant of the circumstances of his estate, and that he who was so exact as to his other stocks was not likely to mistake so widely in this. It is indeed possible that he might intend to purchase a further quantity of South Sea Annuities in his lifetime, but as this is only conjecture, I do not think that his not having done it will defeat his intention, and make his will vain.

It was also objected, that one of the bequests of 5,000*l.*, in South Sea Annuities, is a specific legacy, and it is uncertain which shall have that benefit, and that it is absurd that the same words shall in one instance make a specific legacy and in another a general one. 2nd Objection.

But I am of opinion that the foundation of this objection fails, and that neither of these legacies are *specific* in the strict sense of the term, which I first stated to you. When the

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testator gave away 10,000*l.* in old South Sea Annuities to two different persons, in sums of 5,000*l.* a piece to each, I can see no reason to think that he had in view, or intended to restrain one of those sums to the individual stock which he had more than the other; thus much indeed may fairly be presumed, that he intended so much of that fund as he should die possessed of should immediately upon his death be applied in satisfaction thereof as far as it would go; but there doth not appear to me any more ground to say that he intended his own 5,000*l.* Old Annuities for one of them, preferably to the other, in the present case, than there would have been if he had given in one and the same clause 10,000*l.* Old South Sea Annuities, to be equally divided between them. Suppose the testator had given 5,000*l.* in money to *Ann Snablin*, and afterwards 5,000*l.* in money to *Robert Purse*, and had left only 5,000*l.* in ready money at his death, it could not have been pretended that one of the legatees should have had that individual sum of money rather than the other, though the executor in administering the assets ought to have applied the ready money in payment of the legacies, before he had sold any profitable part of the estate for that purpose. Thus I think it will be in the case of any other legacy consisting in quantity or number, where not the whole but only part of the quantity or number is found amongst the assets; and therefore I apprehend that the executor ought to apply so much Old South Sea Annuities as the testator left at his death, in part of satisfaction of these legacies, in equal proportion.

3d Objection. Another objection was, that the testator giving 5,000*l.* in the *Old Annuity Stock of the South Sea Company*, was like a man giving a sum of money lying in such a chest, or due from a certain person, that therefore it is *demonstratio loci* annexed to the body or substance of the legacy, and if the testator did not leave it, then the legacy fails, according to the distinction of the civilians already taken notice of.

Answer. But that distinction is here misapplied, for the words of the will, in the *Old Annuity Stock of the South Sea Company*, are no *demonstration of place*, but make the description of the thing given. Old South Sea Annuities are a peculiar *species* of property, and can be no where else but in the South Sea Company, but 5,000*l.* in those *Annuities* is no *individual* of that *species*.

4th Objection. It was objected further, that no particular reason appeared, or could be suggested, why the testator should give

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a legacy of 5,000*l.* South Sea Annuities to *Robert Purse*, and intend that they should be purchased for him. No purpose could be answered by it which would not have been answered as well by giving him so much money, and as no trust was *created*, it would be in his power to sell the Annuities as soon as bought, and turn them into money. That this differed it from cases of legacies of provisions, or jewels, or cattle, where some particular use or convenience might be served.

Admitting all these observations to be true, yet I think Answer. they create no objection, for it is not necessary in construing bequests to be able to account for the testator's reasons in making them; but if a conjecture is to be made, I take his intention to have been (what was mentioned by Mr. *Clarke* at the bar) to make his niece, *Ann Snablin*, and his cousin, *Robert Purse*, exactly equal, for as he had given 5,000*l.* Old South Sea Annuities to the former, there was no other way of attaining an exact equality between them but by giving the like quantity of the same fund to the latter. No particular sum of money would have done it, by reason of the uncertainty what might have been the value of the Annuities at his death; but one sum of 5,000*l.* Old South Sea Annuities will always be equal to another sum of 5,000*l.* Old South Sea Annuities at the same point of time.

There is one objection still behind, and that I suspect 5th Objection. of the greatest weight with the parties, that if the construction I have made prevails, there will be little or no surplus left for the residuary legatee.

This is a fact which doth not judicially appear to me, for Answer. the Master reports the estate to be *more* than sufficient to answer all the legacies; but if this fact had appeared, it had been of no force, for in the exposition of wills with us, *particular legatees* are always preferred to the residuary legatee, though that might be otherwise in the Roman law, where the *hæres institutus* was considered in some measure as our law doth an heir by descent, as sitting in the place of his ancestor; but generally speaking, in wills here in *England* residuary bequests are intended only as *sweeping gleaming* clauses, to take up any thing that may have been omitted out of the special dispositions, and the will now in question carries the strongest indication of such an intention that possibly can be, for the testator has given all his real estate by name to his residuary legatee, and has also given him large personal legacies of 2,500*l.* Bank Stock, and 1,500*l.* East India Stock, which looks as if he intended to specify

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the provision he designed him, and not leave it to pass by the residuary bequest. Upon the whole, therefore, my opinion is, that these two bequests of 5,000*l.*, in the Old Annuity Stock of the South Sea Company, ought to be considered as distinct legacies of different sums or quantities of those Annuities, and that the defendant *Ann Snablin*, and the plaintiff *Robert Purse*, are each of them entitled to have the 5,000*l.* of the capital of that fund made good to them out of the testator's assets.

But before I conclude, it is proper to add one thing by way of caution, lest the consequence of this opinion should be carried further than it will bear. I do not intend, neither have I, in any part of what I have said, laid it down as an invariable rule, that in all cases of bequests of stock, they are to be considered as general legacies of quantities or sums, in like manner as pecuniary legacies and other gifts of that nature are. No; it must be always understood that they are to be considered and judged by the particular penning of the will, and the circumstances of the several cases; therefore, if there be any thing shewing or pointing out that the testator intended to confine his gift to such stock as he had, or should have at the time of his death, it will be so confined, and such circumstances will turn the scale the other way that the testator's intention may be complied with. For this reason, I perfectly agree with the resolution in the case of *Ashton v. Ashton*, which was decreed by Lord *Talbot*, 24th November, 1735. The testator gave to trustees the sum of 6,000*l.*, South Sea Annuity Stock, on trust that they should sell and dispose of the same as soon as might be after his decease, and apply the money in purchasing lands, to be settled according to the directions of his will; at the time of making his will the testator had but 5350*l.* South Sea Annuities, and it was adjudged that it must be taken as it was, and should not be made up. And certainly upon the strongest reason in the world, for here was a plain intention to give only what he was possessed of, and the difference between the round sum of 6,000*l.* stock, mentioned in his will, and the broken sum which in fact he had, was such a misapprehension or mistake as a man might naturally fall into; besides, the trust was to sell or dispose of it as soon as might be after his decease, and it would have been highly absurd to suppose that the testator intended to direct his executor to lay out his money in buying stock, in order to sell again, and turn it into money again immediately.

Thus much I thought it necessary to say, in order to pre-

vent too large and general inferences being drawn from this determination.

The consequences of the whole is, that so much of the decree as relates to the two legacies of 5,000*l.*, in Old South Sea Annuities, must be reversed, and a new direction given.

I declare that the said defendant, *Ann Snablin*, now the wife of *Charles Townsend*, and the plaintiff, *Robert Purse*, are each of them entitled by virtue of the testator's will to have 5,000*l.* Old South Sea Annuities made good to them out of the testator's personal estate, and that the 5,000*l.* Old South Sea Annuities whereof he died possessed ought, in the first place, to be applied proportionally toward the satisfaction thereof. And therefore I decree, that the plaintiff *Robert Purse* do transfer one moiety of the said 5,000*l.* Old South Sea Annuities whereof the testator died possessed, and pay one moiety of the dividends grown due thereupon since the testator's death to the said *Charles Townsend*, and *Ann* his wife, and that the said *Robert Purse* do retain the other moiety of the said 5,000*l.* Old South Sea Annuities, and the other moiety of the said dividends to his own use. And I further order that the defendant *Robert Purse* do, with the approbation of the Master, lay out a sufficient part of the said testator's personal estate in purchase of 5,000*l.* Old South Sea Annuities, and that one moiety of the Annuities to be purchased be transferred to the said *Charles Townsend*, and *Ann* his wife, and the other moiety thereof to the defendant *Robert Purse*, and let the Master compute how much the dividends of 5,000*l.* Old South Sea Annuities from the end of one year after the testator's death would have amounted unto, and let one moiety of the amount of such dividend be paid by the said *Robert Purse* to the said *Charles Townsend*, and *Ann* his wife, and the other moiety thereof be retained by the said *Robert Purse* out of the testator's personal estate.

The rest of the order on the Master's report must stand. (1)

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(1) The decree of the *Master of the Rolls* is found in the Register's Book. The reversal of that decree is not to be found in the Register, but in some subsequent orders, grounded upon that

reversal, in the same cause, the recital of the *Lord Chancellor's* decree is to be found, which corresponds with the decree here stated.

GOODERE *v.* LAKE. (1)

October 16th 1738.

Amb. 584. **QUESTION**, Whether the Court had power to give interest, it not being reserved by the decree, but there was a reservation of further directions and costs.

LORD CHANCELLOR, was clear of opinion, that the Court had such a power, by reason of the further directions reserved. And it was so done in the case of the *Hudson's Bay Company v. Sir Stephen Evance*, under the like reservation in the decree.

Court ordered Sir *Bibye Lake* to pay interest for the *Hudson's Bay Stock*.

(1) This case is taken from *Ambler's Reports*. It appears from Lord *Hardwicke's* Note-book, that the question between the parties, which arose upon exceptions to the Masters report, was whether certain quantities of stock of the *Hudson's Bay Company*, which were standing in the name of *Thomas Lake*, at the time of his death, to whom the defendant, Sir *Bibye Lake*, was executor, were his own property, or were held by him in trust for Sir *Stephen Evance* and *William Hales*, bankrupts, of whom *John Goodere* and *Thomas Gibson*, were the surviving assignees. An issue having been directed to try this question, it was found by the verdict, that the stock was the property of Sir *Stephen Evance* and *William Hales*, and the cause coming on upon the equity

reserved, it was prayed that the stock might be transferred, the dividends accounted for, and interest paid upon the money received by way of dividends.

By the decree, all further directions were reserved, but there was no particular reservation of interest. Sir *Bibye Lake* denied the trust, and pleaded the statute of Limitations.

The decree, on further directions, directed Sir *Bibye Lake* to pay interest from the time of the decree, on the sums that had been received before that time for dividends on the stock, and interest from the time of six months after they were received, for sums received for dividends since the decree. (2)

(3) So *Sammes v. Rickman*, 2 Ves. jun. 36., and see *Creuze v. Hunter*, 4 Bro. C. C. 318. S. C. 2 Ves. jun. 157.

ATTORNEY-GENERAL v. SPEED.

ATTORNEY-GENERAL at the Relation
of PETER HYNDE } Plaintiff; (1)
and
JOSEPH SPEED, Executor of SAMUEL
WRIGHT, JANE GLEGG, and Others, }
Executors of THOMAS GLEGG, Another } Defendants.
of the Executors of SAMUEL WRIGHT }

October 22nd or 25th, 1738.

SAMUEL WRIGHT, by his will, dated the 22nd of *August*, 1735, gave to six Nonconformist ministers of good life and conversation, but not worth 200*l.*; certain charities, but directed that the charities should be performed at the discretion of the executors, the qualifications and characters of the objects of the charities to be well considered by his executors. Held that the executors could not divide the objects of the charities into three parts, each nominating a third; and that a list or nomination made by one of the executors, who was since dead, of some of the objects of the charity, was invalid. 1 Atk. 356. Where a testator left his personal estate to

To six honest, sober clergymen of temperate and moderate charitable principles; To their dissenting brethren that are not worth 200*l.*, or provided with a living;

To forty decayed families that are come to poverty purely by losses unavoidable;

To forty poor widows upwards of fifty years of age, and not worth 40*l.*;

To forty poor maidens whose parents formerly lived well, and are come to decay;

To twenty poor boys, to clothe and put out to apprentice, certain legacies; and directed that it might be observed that all the above charities should be performed at the discretion of his executors, their qualifications being duly weighed and considered; and gave the overplus of his personal estate to the widows or poor orphans of poor Nonconformist ministers, not being at the time of the distribution worth 100*l.*, and being upwards of fifty years of age; and directed the said overplus to be paid in such proportions, and to such members only, be the same more or less, as his executors should judge meet; and he appointed *Thomas Glegg, Joseph Paice, and Joseph Speed*, executors of his will, with directions to

(1) The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book., the judgment from *Atkyns*.

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consider well the characters of the persons to whom they disposed of the said charities

After the testator's death, the three executors agreed amongst themselves, that each should nominate one-third of the objects of the charity. *Paice* made out and signed a list of the objects whom he intended to nominate, and acquainted many of them that they should be sharers in the charity, but died before any distribution was made. Evidence was given, that shortly afterwards, *Paice* being likely to die, the two other executors promised him, that in the event of his death, his list should be honoured, and repeated the same promise upon an application being made to them after his death; this however was denied by the answer of the surviving executor.

The information prayed for an account of the personal estate of the testator, and directions for the performance of the charities, and to establish the agreement; and that the objects contained in *Paice's* list might be admitted.

Mr. Attorney-General, Mr. Broune, and Mr. Clarke, and Mr. Murray, for the plaintiffs, contended that the power given to the executors would not survive, that the trustees had in fact executed their trust before *Paice's* death, for that the objects having been ascertained by the list, the payment of the legacies was consequential. That the method adopted was the only one by which the testator's intentions could be carried into effect, for that it was not likely that all the executors would agree upon every object.

Mr. Chute and Mr. Fazakerley, for the surviving executors, insisted that the power was vested in the surviving executors, and cited *Cooker v. Fuge*, 29th of April, 1719, before Lord Macclesfield, and *Lamb v. Fenwick*, 8th of July, 1727, before Sir Joseph Jekyll, that the executors had no power under the will to make the agreement, and that it was never executed.

24th or 25th of
October, 1738.

This is not a
bare authority,
but coupled
with an interest,
and surviving
to the other
executors.

LORD CHANCELLOR.—I am of opinion, that the executors, as taking the whole personal estate, out of which the charities were to issue, had an authority coupled with an interest, as executors have been always held to have in the case of legacies; and therefore the power of nominating the several persons who were to partake of the charity, is continued to the survivor of them.

This Court has
a particular extensive
jurisdiction, in the case of a charity.

But though this is such an authority coupled with an interest as would survive, yet it is so far a trust, that in case

of misbehaviour the Court may interpose, for it must be allowed, that the Court has a particular free and extensive jurisdiction in the case of a charity, and not confined to the proper or formal methods of proceeding requisite in other cases.

I am of opinion, that the executors could not divide the charities into three parts, and each executor nominate a third absolutely, because the determination of the property of every object was left by the testator to the direction of all the executors, and so much of the information as seeks a specific performance of a pretended agreement to that purpose, was dismissed with costs, to be paid by the relators.

N. B. This was said to be the first instance of such a direction.

The decree directed the necessary accounts to be taken, and that the *Master* should enquire which of the legacies given to any charitable use had been paid, and to what persons, and that *Speed*, the surviving executor, should forthwith pay and distribute such as remained unsatisfied to proper objects, pursuant to the directions of the testator's will. And as to the surplus of the said testator's personal estate, it was ordered that the same should be paid by the defendant *Speed*, to such widows or poor orphans of Non-Conformist Ministers as fall within the description mentioned in the testator's will, and as to so much of the information as relates to the establishing the nomination or list signed by the said *Joseph Paice*, it was ordered that the same should be dismissed with costs, the rest of the costs to be paid out of the testator's estate, except the costs relating to the enquiry of the said *Thomas Glegg*'s assets, the consideration of which was reserved. (1)

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The information here was dismissed with costs against the relators.

(1) Reg. Lib. A. 1738. fo. 55.

NUGENT v. GIFFORD. (1)

The Personal Representatives of WIL- }
 LIAM KNIGHT } Plaintiffs;

and

The Daughters and Heirs of RICHARD }
 BILLING, the Personal Representatives }
 of RICHARD ARUNDEL, and the Per- } Defendants.
 sonal Representatives of WILLIAM }
 LONGUEVILLE }

November 3d, 6th, and 13th, 1738.

1 Atk. 463. By a mortgage of 30th November, 1711, certain premises
 Sir Richard *Billing*, being were mortgaged by *Henry Gage*, to *William Longueville* and
 entitled to a sum of money due upon mortgage, by will makes his son sole executor and residuary legatee,
 and dies in the month of October, 1716. In September, 1718, the executor assigns the money
 due upon mortgage to *William Knight*, for the purpose of satisfying his own debt. Held, the
 assignee having no notice of any debt due to the testator, it was a good alienation against
 the creditors of the testator, though it was an assignment of an equitable interest in the assets,
 and though the assignee had notice that it was part of the testator's assets. (2)

(1) The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book, and the judgment from a manuscript report which is found to agree with another manuscript report, and with the report of Mr. *Atkyns*.

(2) So the assignment of a mortgage by three executors, as a security for the receivership of one who was likewise a residuary legatee, the other two not being interested, was held good against creditors, *Mead v. Lord Orrery* and Others, 3 Atk. 235. But of this case, in *Bonney v. Ridgard*, Lord *Kenyon* said, "if it had come before me, I should have decided it in direct opposition to that authority." Lord *Kenyon* had great difficulty in distinguishing *Mead v. Lord Orrery*, from *Bonney v. Ridgard*, 1 Cox's Cases, p. 146. It is apprehended that there were circumstances which distinguished *Mead v. Lord Orrery* from *Bonney v. Ridgard*. In *Mead v. Lord Orrery*, two

of the executors who were not beneficially interested in the estate, joined in the assignment, and in the deed of assignment, there was a recital that the mortgage money was the proper money of that executor who was the residuary legatee. Neither of these circumstances occurred in *Bonney v. Ridgard*. See *Exor v. Corbet*, 2 P. Wms. 148. *El-Hot v. Merriman*, 2 Atk. 41. *Jithell v. Beane*, 1 Ves. 215. *Jacomb v. Harwood*, 2 Ves. 265.

If there be fraud on the part of the purchaser, as if the purchaser has notice of a debt owing from the testator; *Crane v. Drake*, 2 Vern. 616. *Pagett v. Hawkins*, Pre. in Ch. 431. Or where an executrix deposits bonds of the testator which were specifically bequeathed, not only to secure her own debt, but also to secure future advances to be made to her in the character of a trader; See *Scott v. Tyler*, 2 Dick. 712. *Macleod v. Drummond*, 17 Ves. 166.

Or if there be a specific bequest, and

William Knight, for 4,500*l.*, of which it was declared that 3,000*l.* was the proper money of Sir *Richard Billings*.

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In October 1716, Sir *Richard Billings* died, having appointed his son, *Richard Arundel*, otherwise *Billings*, his sole executor, and residuary legatee. *Richard Arundel* was personally indebted to *William Knight* upon several bonds, and by indenture of 13 September, 1718, some of which were of dates prior to the death of Sir *Richard Billings*, between *Richard Arundel* and *William Knight*, after reciting the mortgage of 30th November, 1711, and that *Richard Arundel* was executor to Sir *Richard Billings*, and was indebted to *William Knight* upon the said bonds for better securing the several sums due on those bonds, *Richard Arundel* assigns to *William Knight* the said sum of 3,000*l.* due upon the said mortgage, in trust, after payment of the sums due upon those bonds, and interest, for *Richard Arundel* and his executors.

The bill was filed for payment of these several bond debts out of the mortgage money, and if not, out of the testator's assets.

The daughters of *Richard Arundel* claimed as creditors against the estate of Sir *Richard Billings*, under the marriage article made upon the marriage of their father and mother, whereby Sir *Richard* covenanted to add 10,000*l.* to their mother's portion of 5,000*l.*; and which

the purchaser has notice that there are no debts, or all the debts are paid; *D. Ewer v. Corbet*, 2 P. Wms. 148.

Or if there be even gross negligence on the part of the purchaser, as where an executor, who was a residuary legatee, within a month after the death of the testator, transferred certain stocks of the testator's to his banker's, as a security for a debt then due from him, and for future advances to be made on his own account, *Hill v. Simpson*, 7 Ves. 152. such dispositions are void; and see *Downes v. Power*, 2 Ba. & Be. 491.

But where executors deposited, from time to time, bonds of the testator, which were not specifically bequeathed, together with securities of their own, for advances made to them at the time of such deposit, the Court would not interfere at the instance of co-executors, who had not acted in the administration

of the testator's affairs for a period of fourteen years, *Macleod v. Drummond*, 14 Ves. 353. and 17 Ves. 152.

And a pecuniary legatee may, in cases of fraud or gross negligence follow the assets aliened by the executor, though he has not so strong a claim as a specific legatee, per Sir *William Grant*, 14 Ves. 354.

And the case of a residuary legatee is stronger than the case of a pecuniary legatee, per Lord *Eldon*, D. 17 Ves. 169.

In cases, however, where the party interested suffers a great length of time to elapse without prosecuting his right, a Court of Equity, in analogy to the Statute of Limitations, will not give relief, *Bonney v. Ridgard*, 1 Cox's Cases, 145. *Andrews v. Wrigley*, 4 Bro. C. C. 125. and see *Ray v. Ray*, Cooper's Ca. in Ch. 264. *Keane v. Roberts*, 4 Madd. 332.

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15,000*l.* after the death of their father and mother, was to be divided between them. They insisted that the covenant had not been satisfied, and that there were no assets of Sir *Richard's* to satisfy the covenant, except the mortgage for 3,000*l.*, and they insisted that the 3,000*l.* being the proper assets and effects of the said Sir *Richard Billings*, ought to be applied towards making good his covenant for placing out 15,000*l.* for the benefit of the daughters of the marriage.

Upon the principal question as to the validity of the assignment of the mortgage money by the executors to *William Knight*, for payment of the bond debts, Mr. *Browne* and Mr. *Noel*, for the plaintiff, contended that the executor having the controul over the equitable, as well as the legal assets of the testator, had the power of conveying a good title to the mortgage money to *William Knight*, and cited *Chamberlain v. Chamberlain*, 1 Ch. Ca. 256. and *Stiddolph v. Leigh*, 2 Vern. 75.

Mr. *Attorney-General* and Mr. *Fazakerley*, for the defendants, the daughters, admitted that the sale of a term by an executor was good, but insisted that in the present case, *William Knight* being a trustee of the mortgage, knew that the money was the property of the testator, and was subject to his debts, and that the executor was committing a *devastavit* in applying it to discharge a debt of his own. That the property being in trust, the assignment could only be of an equitable interest, and that of the two equities, that of the defendants ought to prevail, and cited *Crane v. Drake*, 2 Vern. 616. and *Hume v. Dubarry*, 27th Nov. 1723, cor. Lord *Macclesfield*, where an attorney pledged orders by way of security for his own debt, and *Pagett v. Hoskins*, Pre. in Ch. 431.

Nov. 13, 1738. LORD CHANCELLOR.—The principal question is whether the defendants, who are to be considered as creditors, are entitled to follow the 3,000*l.* due upon the mortgage into the hands of the plaintiff, as assignee, in regard that it was originally the money of Sir *Richard Billings*, so as to prevent the plaintiff from having the benefit of the assignment, and to make the money liable as specific assets to the defendant's debt. I am of opinion that in this case the defendant is not entitled to follow the money as specific assets, but that the plaintiff is entitled to the benefit of the assignment, and the security made to him out of it.

By law, undoubtedly, the executor has power to dispose

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of and alien all the assets of the testator, and when he has done so, no creditor of the testator can, in point of law, follow those assets, for the demand is not at law a lien or charge upon the assets, but is a demand against the executor in right of the testator in respect of the assets, and so is a personal demand.

It has been said that this Court goes further than the law in many cases, and will follow the assets of the testator into the hands of other persons besides the executor, and that therefore if an executor consents to a legacy, the debts not being paid, and the executor becomes insolvent, the Court will not suffer the legatee to run away with the legacy by collusion, but will see that the creditors are first satisfied; and that upon the same principle, if an executor makes a voluntary or collusive disposition of the assets, this Court will follow the assets, so that the creditors may have the benefit of them. But this is not the case where an executor disposes of the assets for a valuable consideration, unless there be some fraud or contrivance to defeat the creditors of their debt, for this Court must suffer such alienation to take place as well as the Courts of Law. If it were otherwise, great inconvenience would follow, for no one would venture to deal with an executor to buy any part of the personal estate, if this Court should lay hold of it in his hands for the payment of debts, the existence of which he had no means of ascertaining, for he cannot come into this Court to have an account taken.

It has been contended, that in the present case the assets thus assigned by the executor were not legal but equitable assets, the legal estate in the mortgage term being in the trustees, and the trust being equitable assets, nothing was purchased but an equity, and that he who only takes an equity, must take it, subject to such demands as it was liable to in the hands of him from whom he took it. That is a general rule, but it applies only where the charge or incumbrance lies upon the thing, and not upon the person only; for there is no difference between the power of an executor over legal or equitable assets, he may, in the same manner dispose of either, and it would be mischievous if the Court was to lay down a different rule as to each of them.

It has also been contended that in this case the assignee took the assignment of the 3,000*l.* with notice that it was part of the testators assets, and that consequently it was

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liable to his debts. But if that objection should prevail, it would hold in every case; for whether the assets be legal or equitable, any one who purchases the same from an executor, must know from whence his title comes.

It has also been objected that this assignment was not in consideration of money paid by the plaintiff, but of a debt contracted by the executor in the lifetime of the testator, and that it was a *devastavit* in the executor *eo instanti* that the assignment was made because it was applied to the payment of his own debt; and that to this the purchaser was a party. But there is no authority in this Court where it has been laid down as a general rule, that if an executor sell a term for years, or a chattel for money owing by himself that such sale shall be bad, or that chattels shall be affected in the hands of a purchaser with debts of the testator; and there is no difference between that and money paid down, if it be done *bond fide*, for if the money be paid down the executor may waste it or apply it to debts of his own, and even in satisfaction of that very debt which he owed to the person who bought it. Therefore I do not see that the consideration being a debt before due will make any difference, for a sum of money already due is as good a consideration in law and equity as money advanced at the time.

Two authorities have been much relied upon in this case, 1st, That of *Crane v. Drake*, 2 Vern. 616. But Lord Cowper held, that the defendant was assenting to, and contriving a *devastavit* to defeat the plaintiff of his debt, for there the defendant treated for a leasehold estate, having notice of a bond debt owing from the testator, and at the same time discounted his own debts, which must be taken to be a contrivance to pay the purchasers debt instead of the plaintiffs, of which the purchaser had notice, but there is not the least suggestion of any notice to the purchaser in this case, that *Richard Bellings* owed any debt at all. That case therefore does not come up to the present, being grounded solely on the notice and collusion between the executor and the purchaser.

The other authority is that of *Pagett v. Hoskins*, Prec. Ch. 431. Gilb. Rep. 111. S. C., but neither does that case, in my opinion, come up to the present, for that was not an alienation of any particular chattel out of the testators personal estate to a purchaser for a valuable consideration; but the sum of 6,000*l.* was computed to be the widows share of

the personal estate, and was taken by the second husband as subject to the account, and with plain notice.

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I am therefore of opinion that the alienation or disposition of part of the personal estate of Sir *Richard Billings* was good, and that the plaintiff ought to have the benefit of it, and that the principal, interest, and costs of the bonds intended to be secured by the assignment must be satisfied out of it. (1)

Lord *Hardwicke* to his note of this case has added the following memorandum.

I decreed for the plaintiff the benefit of this assignment, and gave the reasons at large, and distinguished this case from those of *Crane v. Drake*, and *Pagett v. Hoskins* on the point of notice of the debts due from the testator.

In *Crane v. Drake*, the defendant *Drake*, the purchaser, expressly by his answer admitted notice of the plaintiffs debt before his purchase; and in the other case, Sir *Bennet Hoskins* took the assignment of the 6,000*l.*, subject to an account, and took a collateral security to indemnify him against deficiencies in case his wife's share should not come out to be so much as 6,000*l.*

(1) Reg. Lib. B. 1738. fol. 117.

THOMAS HALL, Executor of ELIZA- } Plaintiff; (1)
 BETH OADES }
 and
 STEPHEN and THOMAS TERRY, Exe- } Defendants.
 cutors of MICHAEL TERRY . . . }

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1 Atk. 502. MICHAEL TERRY, by his will, gave to his nephew, Stephen
 2 Eq. Ab. 550.
 8 Vin. Ab. 383. Terry and his heirs all that moiety of the manor of Ilfield,
Michael Terry in the county of Southampton, and the advowson and right
 devises to his
 nephew and his heirs the moiety of an estate, subject to his, the testator's wife's life-estate,
 so as his nephew should, within one year after the estate should come to him, pay amongst
 other sums, to *Elizabeth Oades* 100*l.*, and charges the estate with the payment of the same;
Elizabeth Oades dying in the lifetime of the wife; held that *Elizabeth's* representative was not
 entitled to the 100*l.* (2)

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book; and the judgment from a Manuscript Report, compared with the several printed Reports, another Manuscript Report, and heads of the judgment in Lord *Hardwicke's* Note-book.

(2) Lord *Thurlow* is reported to have said in *Godwin v. Munday*, 1 Bro. Chan. Ca. 191., That *Hall v. Terry* cannot be reconciled with *Lowther v. Condon*, 2 Atk. 127.; and Mr. *Sanders*, in his note to Mr. *Atkyns's* report of the case says, that the same remark seems to apply to other cases, as particularly to *Emes v. Hancock*, 2 Atk. 507. *Hutchins v. Foy*, Com. Rep. 716. *Sherman v. Collins*, 3 Atk. 319. *Tunstall v. Brachen*, Amb. 167., cited in note to 1 Bro. Ch. Ca. 124. *Jeale v. Titckener*, Amb. 703. *Hodgson v. Rawson*, 1 Ves. 44. It is apprehended that *Lowther v. Condon* is easily distinguishable from *Hall v. Terry* by the following circumstances. That there is a gift, independent of a direction for payment; that the legacy is directed to be paid to the executors, administrators, or assigns of the legatees; and

there is a direction, that in case the legatees die, their legacies shall not sink into the estate for the benefit of the heir, but be raised for the benefit of the legatees. So likewise are *Emes v. Hancock*, and *Sherman v. Collins*, distinguishable from *Hall v. Terry*, by a right of entry being given upon the premises charged. *Tunstall v. Brachen*, *Hutchins v. Foy*, *Hodgson v. Rawson*, *Jeale v. Titckener* are likewise distinguishable; for in *Tunstall v. Brachen*, the legacy is to be paid to the legatee, her executors, administrators and assigns, and in one event it is directed that the legacy shall not sink into the estate for the benefit of the heir; and in *Hodgson v. Rawson*, the legatee survived the tenant for life, and in that case, in *Hutchins v. Foy*, and *Jeale v. Titckener*, the payment is directed to be paid out of the estate charged, which shews that the payment was deferred with a view to the possession of the estate, and which, though Lord *Apsley* said it was a slight distinction, yet such distinction fell in with his ideas. See *Jeale v. Titckener*, Amb. Rep. 704.

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of presentation, subject to the settlement made on the marriage of his wife, (under which she became tenant for life, upon the testator's death) so as the said *Stephen Terry*, his heirs and assigns should and would, within the space of one year then next after the said manor and premises should remain, descend, or come to him or them, pay, or cause to be paid divers sums of money to divers persons thereafter named, and particularly to his executors, and to *Elizabeth Oades* and others, 100*l.* each, and directed that the said manor and premises should be charged with the payment of the same; and after giving divers pecuniary legacies, gave and devised the rest and residue of his real and personal estate, his debts and legacies being first thereout allowed and discharged, to *Thomas Terry*, and to the said *Stephen Terry* whom he appointed his executors.

Elizabeth Oades died in the lifetime of the testator's widow, and the plaintiff, her executor, upon the widow's death, filed a bill praying payment of the legacy of 100*l.* given by the testator's will to *Elizabeth Oades* out of his personal estate, or if that should be deficient, then that the same might be raised out of his real estate.

The defendants admitted assets, but insisted that the sum of 100*l.* never was charged upon the personal estate, and that by the death of *Elizabeth Oades* in the lifetime of the testator's widow, it had sunk into the land for the benefit of the devisee.

Mr. *Chute*, Mr. *Fazakerley*, and Mr. *Henley*, for the plaintiffs, insisted that the sum of 100*l.* given to *Elizabeth Oades*, was a vested interest in her, and transmissible by her in her lifetime, and therefore transmissible to her representatives, although she happened to die before the time of payment, which alone was postponed, and cited *King v. Withers*, Cas. temp. Talb. 117., afterwards affirmed in the House of Lords, 3 P. Wms. 414., and 4 Bro. P. C. 228. *Wilson v. Spencer*, 3 P. Wms. 172. *Whalley v. Cox*, 2 Eq. Cas. Abr. 549. pl. 29., in all which cases the legatees or persons to whom the money was left, died before the time of payment, and yet the money was ordered to be raised. They also cited *Innocent v. Taylor*, Finch. Rep., and *Buckley v. Stanlake*, cor. Lord *Macclesfield*, 1720, in which a man seised of a rectory devised it to his wife for life, remainder to his daughter, and her heirs; but if his daughter should die unmarried, then to his wife and her heirs, chargeable with two legacies of 100*l.* each to two strangers. Both the

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legatees died before the daughter, who afterwards herself died an infant, and unmarried. The testator's widow devised the rectory to trustees for the performance of her husband's will, and it was held that the representatives of the two legatees were entitled to the legacies. They also insisted that the sum of 100*l.* was by the words, "his debts and legacies being first thereout discharged, made a charge upon the personal as well as the real estate, and that as the defendants admitted assets, it was at all events payable out of that fund.

Mr. *Attorney-General* and Mr. *Browne*, for the defendants, contended that the sum of 100*l.* was not a legacy, but a charge solely upon the real estate, and given upon a contingency which had not happened. That the subsequent words of the will directing all his legacies to be paid out of his personal estate, did not affect this sum, because it was not a legacy, but that there were legacies given by the will which would satisfy those words. That the distinction between legacies payable out of the personal estate, and sums of money charged upon land, was clearly established. In the former case, this Court adopting the rule of the spiritual court, held that a legacy payable at a future day, was upon the death of the legatee before the day of payment, transmissible to his personal representative, but that in the latter case, the Court considering a charge of a sum of money upon a real estate as a condition annexed to the devise, held that the condition was discharged by the death of the person in whose favour the charge was made before the time limited for payment, and cited *Bright v. Norton* before Lord *Talbot*, where an estate was settled upon a father for life, remainder to trustees for a term of years, remainder to the eldest son in tail, and the trusts of the term were declared to be to raise and pay to the second son the sum of 1,100*l.* within six years after the father's death, with interest, in the mean time. The second son died in the father's lifetime, and Lord *Talbot* held, that no particular time for payment being fixed, but only six years after the father's death, the sum ought not to be raised. They also cited the *Duke of Chandos v. Talbot*, 2 P. Wms. 601. *Poulet v. Poulet*, 1 Vern. 204, 321. *Carter v. Bletsoe*, 2 Vern. 617. *Yates v. Phettiplace*, 2 Vern. 416., and *Prowse v. Abingdon*, ante, page 312.

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LORD CHANCELLOR.—There have been various determinations in cases of this nature, which are not easily reconcilable to each other, being grounded upon very minute

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circumstances laid hold of to warrant them, which if thoroughly considered, would not perhaps appear to afford sufficient reasons for those judgments.

But the general rule of the Court seems now to be, that where a sum of money is charged upon lands, and the legatee dies before the time at which it is payable, it shall sink into the estate for the benefit of the heir or devisee. This was first settled in the case of *Poulet v. Poulet*, 2 Ventr. 366., and 1 Vern. 204, 321.; but it has been attempted by various distinctions to shew that this case does not fall within that general rule.

1st. It has been contended that this sum is charged as well upon the personal as upon the real estate, but I do not think that the personal estate is at all affected by this sum. The residue of the personal estate is given to *Stephen and Thomas*, debts and legacies being first paid. Now this sum is not a legacy, nor is there any bequest of it as such; but there are several other sums mentioned in the will which properly answer that description, and are payable out of the personal estate, whereas the sum in question is charged wholly upon the real estate, and I should so have held if the question had arisen between *Stephen and Thomas*, whether *Thomas's* share of the personal estate should bear part of this burthen. But suppose this had been a charge upon both estates, yet upon the authorities of *Yates v. Phettilplace*, and *Duke of Chandos v. Talbot*, it would have partaken of the realty, so far as to fall into the land upon the death of the party for whom it was intended.

The second point contended for as taking this case out of the general rule was, that the postponement relates only to the time of payment, and cannot in any way be annexed to the substance of the legacy. But this distinction does not hold in cases of charges upon lands, and even if it did, I do not think that it would affect the present question, for in this case there is no gift, except by the words "so as he pay," and the subsequent words, "I will the premises shall be chargeable accordingly," which plainly refers to the former clause, so that here is no original gift, and a time afterwards appointed for payment, but the whole amounts to no more than a direction, that such a sum shall be paid, and if this sum had been to arise wholly out of the personal estate, I think that even in that case, it would not in the event which has happened, been transmissible, the time of payment being annexed to the substance of the gift.

The third point contended for was, that the bequest was

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intended to vest immediately upon the testator's death, and that the reason for appointing the time of payment did not arise from the nature of the bequest, but solely from the circumstances of the estate chargeable with such payment. But if I were to lay any stress upon this objection, I should overthrow many cases which have been fully settled, for by all the late determinations it has been held, that whenever a sum of money is charged upon lands, whether by way of portion or legacy, payable at a future day, and the person dies before the time of payment, it shall sink into the land, and not go to the representative of the person so dying.

I now come to the cases cited for the plaintiff. In the case of *King* and *Withers*, according to my recollection of it, the ground of the judgment was, that there were only two things requisite to vest the right—that is to say, the attaining the age of twenty-one and marriage, both which had actually taken place; and though the payment was subject to a contingency, yet it was expressly provided, that the sum charged should be paid whenever that contingency should happen. In the case of *Wilson v. Spencer*, 3 P.Wms. 172. the legacy was absolutely vested, though the testator had given a year for the payment of it. The circumstances of the case of *Whalley v. Cox* are not sufficiently agreed upon for me to make it the ground of my determination. In the case of *Buckley v. Stanlake* the devise of the wife was expressly to the use of the husband's will, which induced the Court to make a more equitable construction in favour of his bequests. The case of *Innocent v. Taylor* is of no authority, the book from which it is cited not containing Lord Nottingham's own reports. I agree, indeed, that there are several cases about the time at which that of *Innocent v. Taylor* is said to have been decided, which are in favour of the doctrine contended for on behalf of the plaintiff, but being antecedent to the resolution in the case of *Poulet v. Poulet*, which first settled this matter, they are of no weight with me; whereas that of *Bright v. Norton* is an authority which comes up to the present point.

Upon the whole, therefore, I am of opinion, that neither the distinctions endeavoured to be established, nor the authorities cited for the plaintiff, are sufficient to take the case out of the general rule; and that as the sum in question is given to the person in whose right the plaintiff claims it, no otherwise than by the direction for payment, and as she died before the time of payment came, it never vested in her.

Bill dismissed without costs.

SIR WILLIAM ASHBURNHAM and
Others, Executors and Devisees of RO- } Plaintiffs; (1)
BERT BRADSHAW }

and

GEORGE BRADSHAW and Others, the
Heirs at Law of ROBERT BRADSHAW,
the ATTORNEY-GENERAL, and the } Defendants.
Corporation of the Charity for the Sons of
the Clergy, and the Corporation of Queen
Anne's Bounty }

November 8 and 10, and December 11, 1738, and
April 26, 1740.

ROBERT BRADSHAW, by his will, dated the 20th of November, 1734, devised divers lands and tenements to trustees and their heirs, in trust for the benefit of certain charitable uses therein mentioned. 2 Atk. 36.
Barn. 6.
2 Burn's Eccl. Law, 553.

his will of the 20th Nov. 1734, devised certain lands to trustees and their heirs for the benefit of certain charitable uses therein mentioned. The statute of Mortmain commenced from and after the 24th of June, 1736; and Sir W. A. died in July, 1736: held, by all the Judges, that the devise to the charitable uses was good in law. (2) Sir William Ashburnham by

The statute of Mortmain, 9 Geo. 2. c. 36. enacts, that from and after June 24, 1736, no manors, lands, &c. shall be given, granted, aliened, &c. to any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, except in the manner specified in the act, and declares that all gifts, grants, conveyances, &c. of any lands, &c. to or in trust for any charitable uses whatsoever, which shall after the said 24th day of June, 1736, be made in any other manner or form than by that act is directed shall be void.

The testator died in July, 1736.

The object of the bill was to prove the will, and to establish the trusts and charities.

Mr. Browne, Mr. Owen, Mr. Chute, and Mr. Fenwick, for the heirs at law.

(1) The whole of this case is taken from Lord Hardwicke's Note-book, and the papers found amongst his Lordship's manuscripts. 3 Atk. 551, and 1 Ves. 32. S. C. Willet v. Sandford, ibid. 186. Attorney-General v. Heartwell, Amb. 451. S. C. 2 Eden's Rep. 234. Attorney-General v. Downing, Amb. 550.

(2) See Attorney-General v. Lloyd,

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The will was ambulatory till the testator's death ; nothing passed by it until after that time, and consequently not until after the 24th of June, 1736 ; but in order to take this case out of the act, it must be shewn that the lands were conveyed before that time. If wills, made before the act, are to take effect where the testator did not die until after it was passed, it will lead to the greatest frauds, such as antedating wills, &c. It is not to be supposed that the legislature intended to give all the time between the passing of the act and the 24th of June, 1736, to enable people to make those dispositions by their wills which it was the object of the act to prevent. The decisions which were made upon the Statute of Frauds have no application to the question upon this act. That act related only to the form and circumstances of the execution of wills ; this to their actual operation. The Statute of Frauds was construed as if the words had been, all devises of lands made after the 24th of June. This act creates an incapacity in all the subjects of *England* to take lands to charitable uses after the time therein mentioned ; and it cannot be said, that the trustees in this case took any interest in these lands before the testator's death, till that time the will was inoperative. A devise by a joint-tenant is void, though a conveyance severs the joint-tenancy. A devise to a man who afterwards, but before the testator's death, becomes a monk is void.

Mr. *Attorney-General*, Mr. *Fazakerley*, and Mr. *Pilsworth*, for the charities.

This act breaks in much upon the law of the land, and restricts the subject's right of disposing of his property, and ought therefore to be construed with strictness ; and in all cases a construction giving to laws a retrospective operation ought if possible to be avoided. It has been argued that a will is as nothing before the death of the testator, but the time of making it is in many respects material. The testator must have the lands devised at the time, and if he should afterwards become lunatic, his will will nevertheless be good. The words in this act relate solely to the act of the party, and the word given peculiarly applies to wills ; and can it be said, that the testator gave the property in question after the 24th of June ? after that time he did nothing to affect his property. It is common parlance for a testator to say, that he has given property by his will. It is the will which conveys and settles the land, and not the death of the party. It is like an executory devise made before the act which did

not take effect until afterwards. The cases upon the Statute of Frauds are precisely in point. *Serjeant v. Puntis*, Pre. in Ch. 77.

The Lord Chancellor mentioned the case of *Gillmore v. Shuter*, 2 Mod. 310. 2 Lev. 227. 2 Jones, 208. 1 Freem. 466. 1 Vent. 330. 2 Shaw. 16. and on the 11th December, the cause standing again in the paper, his Lordship declared that the first question appeared to be a point of law, arising upon the construction of a new Act of Parliament, which had never come in judgment before, and to be a matter of great consequence, for which reason he thought it fit, in order to the settling the law thereon, to take the opinions of all the Judges, and therefore ordered that the opinions of all the Judges should be taken upon the following case, *viz.*—*Robert Bradshaw, Clerk*, on the 24th day of November, 1734, duly made and executed his last will and testament in writing, and by the said will, gave and devised divers lands and tenements to trustees and their heirs, in trust, or for the benefit of certain charitable uses therein mentioned, amongst several other trusts.

The statute of the 9th Geo. 2. intitled an Act to restrain the Disposition of Lands, whereby the same become Unalienable, commenced from and after the 24th day of June, 1736.

In July, 1736, the testator died without altering or revoking his said will.

Question : Whether such gift or devise, so far as the same relates to the charitable uses aforesaid, be good in law, notwithstanding the said statute or not.

The Judges, on the 4th of December, 1739, certified that they were of opinion that the gift or devise, so far as the same related to the charitable uses aforesaid, was good in law, notwithstanding the said statute.

This certificate was signed by—

W. LEE.	J. FORTESCUE, A.
J. WILLES.	W. FORTESCUE.
J. COMYNS.	W. CHAPPLE.
F. PAGE.	T. PARKER.
LAW: CARTER.	M. WRIGHT.
E. PROBYN.	

The following note is found amongst Lord *Hardwicke's* papers relative to this cause ; it does not appear by which of the Judges it was furnished :

“ All the Judges except Mr. Justice *Denton* having heard counsel for all the parties, met at Lord Chief Justice *Lee's*

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chambers, 4th December, 1739, and held that a will was a revocable disposition *in præsentì*, to take effect *in futuro*, that there are two times a will has respect to, the time of making, and the time of its taking effect by the death of the testator. The time of making the will concerns the capacity of the giver; the time of its taking effect, by the death of the testator, concerns the capacity of the taker. The present act does not work an incapacity in the taker, but in the giver. The act has no retrospect; if that had been intended, it would have been general, and not to take effect from a particular day. They unanimously held the devise good, and accordingly certified to the *Lord Chancellor*, and grounded their opinions on Dy. 45. b. 2. And. 11. 4 Leonard. 5. prop. 106. 3 Bul. 43. 47. 2 Ch. Rep. 301 to 303. 2 Mod. 310. 2 Show. 17. Skin. 227. Pre. in Ch. 77. 2 Lev. 227. 2 Jo. 108. 1 Vent. 330. *Bunter v. Coke*, 1 Salk. 237. Fitzg. 225. 233., and my brother *Denton* informed me that he entirely concurred in this opinion."

The following letter from Lord Chief Baron *Parker* to Lord *Hardwicke*, dated 1st December, 1738, is likewise found amongst the papers relating to this cause.

"MY LORD,

"I have considered of the statute of the 9th of his present Majesty, against dispositions to charitable uses, which recites those dispositions to be contrary to law, and enacts, that from and after the 24th of June, 1736, no manors, lands, &c. shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, &c. in trust, or for the benefit of any charitable uses, unless in the manner therein directed; and by another section provides, that all gifts, &c. which shall, from and after that day be *made* in any other manner or form, shall be void. The question is, whether this act extends to a will made before the 24th of June, 1736, by a man who died after that day.

"It must be admitted that a will is so far ambulatory, and not consummated, that no interest can vest in the devisee till the testator's death; but though a will is subject to revocation during the testator's life, and cannot take effect with respect to the passing of an interest till his death, yet it seems to me to be a disposition of the estate devised from the time of making, because no writing, publication, or other act is necessary to be done between the making of the will and the testator's death, and if so, the statute will not affect the pre-

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sent case. This your Lordship will find to be my Lord *Holt's* opinion in the case of *Bunter v. Coke*, in *Fitzg. Rep.* 226. and Lord *Trevor's* opinion in the case of *Arthur v. Bockenham*, 237, 238, 239, of the same book. The cases in this book are very incorrectly reported, but I have been credibly informed that these two arguments are authentic, and were communicated by Mr. *D'Anvers* to Mr. *Walthoe*, the publisher, to make the book sell the better. There are no terms in *Fitzgibbon* when these resolutions were delivered, but I find in *Salk.* 237. that the case of *Bunter* and *Coke* was determined Mich. 6 Annæ, B. R. and by the Journals of the House of Lords, which I have perused, the judgment appears to be affirmed 24th Feb. 1707, and by a report of Mr. *Blencowes*, (where the case of *Arthur v. Bockenham* in *Fitzgibbon* is called by the name of *Archer v. Bockenham*,) the resolution of the Court of Common Pleas appears to be delivered in Hilary 1707-8. The case of *Gilmore v. Shuter*, 2 Lev. 227. 2 Jo. 108. 109. 2 Show. 16. 17. 1 Vent. 330. seems to countenance this opinion, though not entirely similar, because wills are gratuitous dispositions, but it would have been against natural justice to have construed the Statute of Frauds, to have a retrospect so as to destroy contracts for just debts, but the case in 2 Ch. Rep. 301. and the Judges' opinions cited by Mr. *Pollexfen*, in 2 Show. 17. do in my humble apprehension, pretty much resemble the present case. By 29 Car. 2. c. 3. s. 5. devises of lands are to be in writing, and executed as there directed, or else to be void. The circumstances there required affect the operation of the will as well as the directions of this statute affect the operations of a gift, and there is room for the same observation in the word 'restrain' in the title of this act as upon the word 'prevention' in the title of the Statute of Frauds, to shew this to be a cautionary law made to prevent future inconveniences.

I submit these loose thoughts to your Lordship's consideration; and am as I am bound to to be with the utmost respect.

My Lord,

Your Lordship's most obliged humble servant,

T. PARKER.

Inner Temple,
December 1, 1738.

The LORD CHANCELLOR, on the 26th of April, 1740, decreed the charitable bequests, and devises, and the trusts of the will to be established. (1)

RAINSFORD v. LANGHAM. (1)

Nov. 11th, 1738.

Sir Edward Nichols being entitled to the advowson of *Hardwicke*, by his will devises to his trustees and their heirs all and singular his messuages, cottages, closes, farms, woods, lands, tenements, and hereditaments, lying in *Hardwicke*, &c. and all other his lands and tenements whatsoever not before devised, with their appurtenances, upon trust to pay 30*l.* per annum, to each of the vicars of eight vicarages, one of which was the

SIR EDWARD NICHOLS being seised in fee of the manor of *Faxton* and of several messuages and lands in *Faxton*, *Hasilbick*, *Sulby* and *Hardwicke*, and also of the advowson of the church of *Hardwicke*, by will bearing date 12th of August, 1708, devised part of the premises to the use of his sister for life; and then gave and devised to his trustees their heirs and assigns for ever, all and singular other his messuages, cottages, closes, farms, woods, lands, tenements, and hereditaments, whatsoever, situate, standing, lying and being in *Faxton* aforesaid, *Hasilbick*, *Sulby* and *Hardwicke*, and all other his lands and tenements whatsoever before devised, with their and every of their appurtenances, upon this special trust and confidence in them reposed, and to the intent and purpose that they do and shall out of the rents and profits yearly and every year for ever hereafter pay or cause to be paid the sum of 30*l.* a-piece to eight several vicars for the time being of eight respective vicarages, one of which was the vicarage of *Hardwicke*, and directed that the surplus of the rents should be disposed of to such charitable uses as the trustees should think fit.

vicarage of *Hardwicke* and directs the surplus of the rents to be disposed of to such charitable uses as his trustees should think fit.

The church of *Hardwicke* having become vacant after the death of the testator, upon a bill filed against the trustees by the heir at law of the testator alleging that the advowson passed to them under the will, and against the bishop to compel him to grant institution to the plaintiff's clerk. It was held upon the certificate of the judges that the advowson did not pass by the will to the trustees; and a lapse having been incurred the bishop was decreed to admit the plaintiff's clerk.

After the testator's death the church of *Hardwicke* became vacant, and the plaintiff being the heir of *Jane Kemsey* deceased, who was the heir of *Sir Edward Nicholls*, filed a bill against the bishop to injoin him from presenting the clerk nominated by the trustees, and to compel him to grant institution to the clerk nominated by the plaintiff, and against the trustees alleging that the advowson passed to them under

(1) The whole of this case is taken from a manuscript report, Lord *Hardwicke's* note of it being very sho

the will, and insisting that no use being declared of it there was a resulting trust for the heir at law.

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The LORD CHANCELLOR, conceiving a doubt whether the advowson passed to the trustees by the will directed a case to be made upon that point for the opinion of the judges of the Court of King's Bench, who after hearing it twice argued certified unanimously that they were of opinion that the advowson did not pass by the will to the trustees.

The cause now came on again.

LORD CHANCELLOR. But for one reason I should have dismissed the plaintiff's bill, for it comes now to be in the nature of a *quare impedit*.

The first question was, whether the advowson passed, and if it did, then 2ndly, Whether there was a resulting trust for the heir at law.

The opinion of the judges is, that this is strictly a legal title; but a circumstance has taken place which prevents the plaintiff from maintaining a *quare impedit*, namely that a lapse has been incurred.

Now as this Court sometimes interposes to prevent the statute of limitations from taking effect, so in this case it may be decreed that the advowson descended upon the heir at law of Sir *Edward Nichols*, and that the Bishop of *Peterborough* ought to admit the clerk who has been appointed under that title.

Decree that the bishop do admit the plaintiff's clerk without costs. (1)

(1) Reg. Lib. B. 1738. fo. 110.

BRANDLING v. ORD. (1)

November 15th, 1738.

1 Atk. 571.

A man who purchases for a valuable consideration, with notice of a voluntary settlement, from a person

It was said by the *Lord Chancellor* in this cause, that a man who purchases for a valuable consideration, with notice of a voluntary settlement from a person who bought without notice, shall shelter himself under the first purchaser, yet it must be very same interest in every respect.

who bought without notice, shall shelter himself under the first purchase. (2)

A man cannot defend himself in this court, as a purchaser for a valuable consideration under articles (3).

He likewise said, he never knew a man defend himself in this Court, as a purchaser for a valuable consideration under articles only; if he is injured, he must sue at law upon the covenants in the articles.

Where defendants pleaded a former suit they must shew it was *res judicata*.

His Lordship also laid it down as a rule, that where the defendants plead a former suit, that the Court implied there was no title when they dismissed the bill, is not sufficient, they must shew it was *res judicata*, an absolute determination in the Court that the plaintiff had no title.

A tenant in tail out of possession, cannot bring a bill to perpetuate testimony.

He also held, that a tenant in tail, out of possession, cannot bring a bill to perpetuate testimony of witnesses, till he has recovered possession by ejectment; if he does, on the defendant's demurring for this reason, the Court will allow it. (4)

A bill dropped for want of prosecution, is never to be pleaded as a decree of dismissal.

And that a bill dropped for want of prosecution is never to be pleaded as a decree of dismissal in bar to another bill.

And that a fine by a termor for years, is a forfeiture; but the reversioner has five years after the expiration of the term to enter.

(1) This case is taken from *Atkyns*. There is no statement of the case in Lord *Hardwicke's* Note-book, or in the Register's-book, it appears both from his Lordship's Note-book and the Register's book that the plea was overruled. See Reg. Lib. A. 1738. fo. 21.

(2) See *Lomther v. Carleton*, Cas. temp. Talbot, 187. *Harrison v. Forth*,

Prec. in Chan. 51. *Kennedy v. Daly*, 1 Sch. & Lef. 379. *Macqueen v. Farquhar*, 11 Ves. 479.

(3) See *Fitzgerald v. Falconbridge*, Fitz. Rep. 207. *Hart v. Middlehurst*, 3 Atk. 377.

(4) *Parry v. Rogers*, 1 Vern. 441. *Philips v. Carew*, 1 P. Wms. 117., and see Mitford's Pleadings, 131.

CONYERS and OTHERS Plaintiffs ; (1)

and

LORD ABERGAVENNY and OTHERS . Defendants.

Nov. 16th, 1738.

A MOTION by the plaintiff for an injunction to stay the proceedings of the Defendants at law till the hearing of the cause in this Court, upon a suggestion that this is a bill of peace, and always favoured in equity, for the principal prayer of it is, that the defendants who have only a small interest in that part of the manor of *Tunbridge*, which is in dispute may accept of such a compensation as this Court shall think reasonable, for the houses the plaintiff has built upon the waste.

building houses on the manor without leave, and that they may accept of such as the Court shall think reasonable.

LORD CHANCELLOR :—I do not see how this Court can assume such a power, unless they had a right of being applied to as an arbitrator, or had a legislative authority lodged in them, neither of which belong to them; for they act only in a judicial capacity.

The proper bill of peace was a former one, brought by the tenants of this manor, for such a bill may as well be brought by tenants against a lord, as by a lord against tenants; (2) but that bill was dismissed, upon the suggestion of this very plaintiff, Mr. *Conyers* himself, that they ought regularly to proceed at law; and therefore thither let him go, and not apply improperly for relief in that Court, which he had absolutely insisted had no power of relieving. This comes very near the case of election, for he has chosen to proceed at law, and therefore let him seek his remedy there.

His Lordship for these reasons ordered the injunction to stand dissolved.

1 Atk. 285.

A bill of peace praying an injunction to stay the defendants who have an interest in the manor of *Tunbridge* from proceeding at law against the plaintiffs for a compensation

The Court dissolved the injunction, as they cannot be applied to as an arbitrator, nor have any legislative authority, but act in a judicial capacity.

A bill of peace may as well be brought by tenants against a lord, as by a lord against tenants.

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.

(2) See *The Mayor of York v. Pilkington*, ante page 293, and the notes to that case.

EDMUND OKEDEN Plaintiff; (1)

and

PETER WALTER, JOHN BOND, WILLIAM OKEDEN, JOHN GOULD and MARY his Wife, CONYERS PLACE the Younger, Clerk, and MAGDALEN, his Wife, and WILLIAM OKEDEN, an Infant, the Son of the Plaintiff . . . } Defendants.

November 15th and 17th, 1738.

1 Atk. 550.

William Okeden by his will directs that his debts and legacies and also the sum of 5,000*l.* due to his daughter should be paid out of his personal estate, but if that should be insufficient then he devises certain estates upon trust to sell the same or any part

WILLIAM OKEDEN having two natural sons, the plaintiff and the defendant, *William Okeden*; and only one legitimate child, *Mary Glisson*, to whom a sum of 5,000*l.* upon his death was secured by a term affecting all his real estates which was created by his marriage settlement; by his will, dated the 29th of January, 1716, directed that his debts and legacies, and also the said 5,000*l.* due to his daughter should be paid out of his personal estate; and if that should not be sufficient, then he devised to trustees certain estates in the counties of *Dorset* and *Wilts*, In trust that the trustees and their heirs might sell the same or any part thereof, and thereby pay off his debts, legacies, and funeral expenses, and also the said 5,000*l.* and such part as should not be sold, he devised to the same uses as his man- thereof, and thereby pay off his debts and the said 5,000*l.*, and such part as should not be sold, and all other his lands he devised to trustees for 300 years with remainder to the defendant, *William Okeden*, for life, remainder to his first and other sons in tail male with like remainder to the plaintiff and his first and other sons; and he declared the trusts of the 300 years term to be that the trustees should receive the rents, issues, and profits thereof, and thereout after paying a certain annuity should apply such sums as they should think fit for the maintenance, placing out, and education of the plaintiff and defendant, his two natural sons, until they should attain the age of twenty-five years, and for raising the 5,000*l.* for the plaintiff, in case he should attain the age of twenty-five; and to apply yearly such sums as should be necessary for the support and reparation of his mansion-house, buildings, and estates, and to pay the residue of the rents and profits to the person entitled to the estate after the term was satisfied.

Held, that the sum of 5,000*l.* given to the plaintiff was not to be raised by sale, but after payment of the annuity and the maintenance was to be paid out of the rents and profits of the estate until *William Okeden* attained the age of twenty-five.

(1) The statement of this case, and the arguments of counsel are taken from Lord Hardwicke's Note-book; the judgment from *Atkyns*.

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sion house at *Moor-Critchell*, and which by his said will and all other his lands he devised to trustees for three-hundred years, remainder to the defendant *William Okeden* for life, remainder to his first and other sons in tail male, remainder to the plaintiff for life, remainder to his first and other sons in tail male, remainder to his own right heirs with power for his two natural sons to make jointures and leases when they should come into possession. And he declared the trusts of the term of 300 years to be that his trustees should from time to time receive all and singular the rents, issues, and profits, and thereout to pay 30*l.* *per annum* to *Mary Morgan*, provided she continued sole and unmarried; and that his trustees should apply such sums for the maintenance, placing out in the world, and education of the plaintiff and defendant, his two natural sons as they should think fit, until they should attain the age of twenty-five years, and for raising the sum of 5,000*l.* for the plaintiff in case he should attain the age of twenty-five years; and to apply yearly such sums as should be necessary for the support and reparation of his mansion-house, and other buildings, houses, plantations, and estates, for taking care of and managing his estate, and to pay the residue of the rents and profits to the person entitled to the estate after the term was satisfied.

The testator died in 1718, leaving *Mary Glisson*, his only legitimate child, who with her husband died soon afterwards intestate, leaving the defendants, *Mary Gould* and *Jane Pace*, her only children, and who thereupon became entitled to the 5,000*l.* secured by the marriage settlement and to the reversion in fee of the real estate.

The object of the bill was for a sale of a sufficient part of the estate to pay off the charges imposed by the will.

It appeared that the defendant, *William Okeden*, attained the age of twenty-five in 1728, and that the plaintiff attained that age in 1731, and that the defendant having been let into possession of the estate by the trustees when he attained the age of twenty-one years had ever since applied the rents and profits to his own use.

The question was whether the sums of money charged upon the term of 300 years were to be raised by a sale of the lands, or were to be paid out of the rents and profits.

Mr. Browne for the plaintiff.

Mr. Serjeant Hussey and *Mr. Wilbraham* for the defendant *William Okeden*. *Mr. Attorney-General* and *Mr.*

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Fazakerley for the trustees, contended, that the incumbrances ought to be paid by a sale of a sufficient part of the land; that if otherwise no provision would remain for the tenant for life, and the creation of the term would be useless. That a charge of a gross sum upon rents and profits was always construed to authorise a sale. That the plaintiff was entitled to his 5,000*l.* at the age of twenty-five, and after that age, the provision for his maintenance ceased; but that object could only be secured by raising the money by a sale for the whole estate did not exceed 650*l. per annum*, and as the 5,000*l.* was not to be paid, unless the plaintiff lived to the age of twenty-five, it could not till that time be a charge upon the rents and profits, and they cited *Rook v. Banks*, 5th or 6th December, 5 Ann cor. *Couper, C.* which was re-heard in 1722, by Lord *Macclesfield*, who thought that the opinion of Lord *Couper* was wrong, because the case differed but little from that of *Ivy v. Gilbert*; also *Jones v. Warren*, March 1728. Cor. *King, C.* *Trafford v. Ashton*, 1 P. Wms. 415. *Berry v. Askham*, 2 Vern. 26. *Sheldon v. Dormer*, 2 Vern. 310.; and Sir *I. Talbot v. Duke of Shrewsbury*, Prec. in Ch. 394., and *Warburton v. Warburton*, 2 Vern. 420.

Mr. *Noel*, and Mr. *Floyer*, for the defendants *Mary Gould* and *Jane Pace*, who were entitled to the reversion in fee, contended that the charges were to be satisfied by the rents and profits only, and that there was no authority to sell the term of three hundred years, that some of the trusts of that term could only be executed by receiving the rents and profits, as that for keeping the estates in repair. That where the testator intended to give a power of sale, the words are express, as in the direction relative to the raising of the daughter's portion of 5,000*l.* That the last trust to pay over the residue of the rents and profits, clearly implies that the other trusts were to be carried into effect out of the other parts of the rents and profits, and they cited *Ivy v. Gilbert*, 2 P. Wms. 13. Prec. in Ch. 583.

Nov. 17, 1738.

LORD CHANCELLOR.—The intention of the testator is clear to me, that the sum of 5,000*l.* was to be raised out of the rents and profits, and not from an absolute sale, unless from mere necessity; and what the Court would do in such case is another consideration. (1)

The directing the trustees to pay yearly money for the

(1) See *Green v. Belchier*, ante, p. 217, and the notes to that case.

repairs of the mansion-house, farm-houses, plantations, &c., is a strong indication that the trustees should keep possession, till the defendant, *William Okeden*, arrived at his age of twenty-five.

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I do not think that the directing a gross sum to be raised, will necessarily imply that it should be raised at once, and this was settled in the case of *Evelyn v. Evelyn*, 2 P. Wms. 291.; for it may be raised out of the rents and profits, and so laid up till it amounts to that sum.

The age of twenty-five in this will, is the time fixed for the payment, but I do not think it the time fixed for the raising, for the testator has directed, if there should be any surplus, that it should be paid to the reversioner, and the natural consequence would have been, if *William Okeden* had died before twenty-five, that what had been received out of the rents would have been the money of the reversioner, and must have been paid over to him.

Whether the testator computed right as to the value of this estate is not material, for the view and intention is to be regarded only.

The consideration is, how far this Court will controul the original and natural import of the testator's words, so as to decree a sale.

There have been a great many strong cases cited to this purpose, but they do not come up to the present case. The case of *Sheldon v. Dormer*, 2 Vern. 310. goes upon the point of necessity, that the annual rents and profits would not, in a vast tract of time, pay the money; besides, in that case, the very sale of the estate itself would not answer the 4,000*l.* charged upon it.

Ivy v. Gilbert is not a case in point, for the defendant the reversioner, and indeed it is impossible that these cases arising upon wills should tally in every respect, yet it certainly is a very strong case in favour of the reversioner.

It has been truly said, that this Court has laid great stress upon a particular time being appointed for the payment, and has enlarged the power of trustees, in order to raise the money within the time.

Therefore here the surplus profits over and above the 50*l.* per annum annuity, and the maintenance to *Edmund*, shall be applied towards the discharge of the 5,000*l.*, but if the surplus profits will not be sufficient to answer the purpose, then I shall be strongly inclined that the estate shall be sold to make up the deficiency.

This Court lays great stress upon a particular time being appointed for the payment of a portion, and has enlarged the power of trustees to raise it within the time.

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It is absurd to suppose that the defendant *William Okeden*, was entitled to be let into possession before he attained his age of twenty-five, as both he and his brother were to have a maintenance till that age, and therefore the trustees, by letting him into possession of the rents and profits before that age, have abused their trust; for as they have managed, how was it possible that the 5,000*l.* could be raised by the time the plaintiff came to the age of twenty-five.

I will not immediately decree a sale, till the trustees have accounted for the surplus rents and profits; for it is hard the reversioner should suffer by the sale of the estate, when it might have been quite cleared, if the trustees had faithfully executed their trust.

His Lordship ordered it should be referred to a Master, to take an account of the rents and profits of the trust devised to the trustees for the term of 300 years, accrued from the death of the testator, *William Okeden*, until the defendant *William Okeden* attained twenty-five years, that have been received by the trustees, or by the defendant *William Okeden*, and his Lordship declared that the defendants the trustees are answerable for so much thereof as have been received by the defendant, *William Okeden*, until he attained the age of twenty-five years.

And his lordship decreed that the rents and profits, after making certain allowances therein mentioned; were to be applied to the payment of the said portion of 5,000*l.* given by the testator's will to the plaintiff. And the consideration of how the surplus was to be raised in case of deficiency, was reserved. (1)

HARDY v. BAKER and Others. (1).

November 20th, 1738.

THE bill was for an account of the personal estate of *Mary Mottershed*, deceased.

Mary Mottershed shortly before her

death told her servant that she had put in the drawer where her will was laid a purse with fifty guineas in it, which, when she was dead she desired her servant to take and give to the defendant *Baker*. Held that the gift was void. That it could not operate as a *donatio mortis causa* because there was no delivery, nor as a nuncupative will, the requisites of the statute not having been complied with.

The defendant, *Baker*, was one of the executors and trustees to whom 100*l.* was given by the will for his trouble.

He also claimed to retain fifty guineas under the following circumstances:—

It appeared from the evidence of *Ann Searle*, a servant to the deceased, that the testatrix shortly before her death had told her that she the testatrix was much obliged to her cousin, the defendant *Baker*, for several services; and that she had intended to make his children some present; but that as that might be taken notice of she had put in the drawer where her will was laid a purse with fifty guineas in it, which when she was dead, she desired the witness to take and give to the defendant, *Baker*.

The Lord Chancellor said, that he did not see how this gift could take effect; that it could not as a *donatio mortis causa*, because there was no delivery in the lifetime of the testatrix; and that it could not take effect as a nuncupative will because the directions of the statute had not been followed. His Lordship declared that the defendant, *George Baker*, was not entitled to the said fifty guineas insisted on by his answer, and decreed a general account of the personal estate of *Mary Mottershed*. (1)

(1) This case is taken from a manuscript report compared with Lord Hard-

wicke's Note book.

(2) Reg. Lib. A. 1738. fo. 369.

PHILADELPHIA BOYCOT, SOPHIA
COTTON, HESTER MARIA COT-
TON and SYDNEY ARABELLA COT-
TON, the surviving Daughters of Sir
THOMAS COTTON, and PHILADEL-
PHIA, his Wife

Plaintiffs; (1)

and

Sir ROBERT SALISBURY COTTON,
and Dame PHILADELPAIA COTTON,
his Wife, LYNCH SALISBURY COT-
TON, COTTON KING, and JOHN
CREW

Defendants.

November 20th and 24th, 1738.

1 Atk. 552.

By indenture
of the 27th of
July, 1687,
Sir Thomas
Cotton when
in possession
of a certain
estate was
empowered

to limit any part of the estate not exceeding 500*l. per annum* to a wife, for her jointure, and also to limit any part of the lands not exceeding 500*l. per annum* for raising portions for younger children.

The value of the estate not exceeding 600*l. per annum*, Sir Robert Cotton when in possession by deed in pursuance of his power, charges part of the lands with 500*l. per annum* for the jointure of his wife and by another deed charges the residue of the lands and the reversion of the lands charged with his wife's jointure with the sum of 675*l.* for each of his younger children to be paid to such of them as should attain twenty-one before his death, within one year after his death, and as to such of them as should not have attained that age, to be paid to the sons at twenty-one, and to the daughters at twenty-one or marriage, such respective portions to be paid with interest at 5*l. per cent.* from the time of his death to the time of the payment thereof. Sir Thomas Cotton died in 1715, John S. Cotton one of his sons died in 1728, having attained the age of twenty-six, and Vere Cotton in 1730, having attained the age of sixteen. Held that Sir Thomas Cotton under the deed of July, 1687, was empowered to charge the estate with interest upon his children's portions before the time at which they were payable. (2) And that the interest upon the portions ought not to accumulate until the time of payment; but ought to be paid annually until the principal became due; and that Miss Vere Cotton having died unmarried and under the age of twenty-one, her portion sunk into the estate for the benefit of the heir at law. (3)

(1) The statement of this case and the arguments of counsel are taken from Lord Hardwicke's Note-book, the judgment from two manuscript reports.

(2) A power to charge a sum in gross upon land implies a power to

give interest, Lord Kilmarry v. Geery, 2 Salk. 538. Hall v. Carter, 2 Atk. 358. Lewis v. Freke, 2 Vez. Jun. 509.

(3) See Prowse v. Abingdon, ante, page 312.

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and their heirs male in like manner, remainder to the right heirs of Dame *Hester*. And it was provided that it should be lawful for *Thomas Cotton*, and the other sons when in possession, after the death of Sir *Robert Cotton* and *Hester* his wife, by deed or will to limit any part of the lands not exceeding 500*l. per annum* to a wife for life for her jointure, and also to limit and charge any part of the lands not exceeding 500*l. per annum* for the purpose of raising portions for younger children.

The whole of these lands did not exceed the annual value of 600*l.*

The eldest son of Sir *Robert Cotton* afterwards died, and *Thomas Cotton*, then the eldest son, married and had several children.

Sir *Robert Cotton* and Dame *Hester* his wife afterwards died, and in 1714, *Thomas* then Sir *Thomas Cotton* in pursuance of the powers reserved to him by the deed of July 27, 1687, by a deed poll of the 31st of July, 1714, charged certain of the lands comprised in that deed with the sum of 500*l. per annum* for his wife for life, for her jointure; and by another deed poll dated the 1st of August, 1714, charged the residue of the lands comprised in that deed, and the reversion of the lands charged with his wife's jointure with the sum of 675*l.* for each of his younger children to be paid to such of them as should attain twenty-one before his death, within one year after his death; and as to such of them as should not then have attained that age, to be paid to the sons at twenty-one, and to the daughters at twenty-one or marriage such respective portions to be paid with interest at 5*l. per cent.* from the time of his death to the time of the payment thereof.

Sir *Thomas Cotton* died in 1715, leaving his wife his executrix; in 1728 *John Salisbury Cotton*, one of the younger children, died at the age of twenty-six, and in 1730, *Vere Cotton*, another of the younger children died at the age of sixteen, both intestate and unmarried and without having received their portions.

The mother, the widow of Sir *Thomas Cotton*, in pursuance of an agreement for that purpose assigned all her interest in the personal estate of the deceased *John Salisbury Cotton* and *Vere Cotton*, to the plaintiffs the surviving daughters.

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The bill prayed that the sum of 675*l.* a-piece to which the plaintiffs were entitled under the deed of 1st August, 1714, might be raised and paid to them with interest, from the death of Sir *Thomas Cotton*, and also that the plaintiff's distributive share of the two sums of 675*l.* and interest, to which they claimed to be entitled in right of *John Salisbury Cotton*, and *Vere Cotton* deceased, might in like manner be raised and paid to them.

Mr. *Attorney-General*, Mr. *Chute*, and Mr. *Wilbraham*, for the plaintiffs, contended that the portion of *Vere Cotton* was transmissible, although she did not live to attain the age at which it was payable, because the giving interest in the mean time made it vested, and cited *Stapleton v. Cheele*, 2 Vern. 673., and Prec. in Ch. 317., and *Cave v. Cave*, 2 Vern. 508.

Mr. *Browne* and Mr. *Fazakerley*, for the defendant Sir *Robert Salisbury Cotton*, the eldest son, insisted that the portion of *Vere Cotton*, who died before the time at which it was payable sunk into the estate. That the deed of 27th of *July*, 1687, did not give Sir *Thomas Cotton* the power to charge the estate with interest upon the portions, for that after deducting the 500*l.* *per annum* jointure, the estate was not sufficient to pay interest upon the portions, and that it was not to be supposed that interest was to be raised out of the reversion, and that if the power did extend to charge any interest upon the portions, it could not extend to charge a sum by way of interest to be paid at the time the portions were payable, and not to be payable from time to time; and that such was the intention of the deed of 1st of August, 1714. They also insisted that Sir *Robert Salisbury Cotton* was entitled to an allowance for the maintenance of *John Salisbury Cotton* deceased, who had lived several years with him, although no agreement had ever been made for that purpose, and cited *Carter v. Bletsoe*, 2 Vern. 617. Prec. in Ch. 267., and *Tournay v. Tournay*, Prec. in Ch. 290.

Nov. 24, 1738.

LORD CHANCELLOR.—Three questions have been made in this case, 1st, whether by virtue of the power contained in the deed of 1687, Sir *Thomas Cotton* could charge the estate with interest upon his children's portions before the time at which they were payable.

2ndly, Supposing that he could, the next question is on the construction of the execution of the power, whether he has charged interest so that it will become due annually

from time to time until the time of payment, or whether it ought to accumulate and wait till that time, and then be paid together with the principal sum.

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3rdly, The third question relates only to the portion of Miss Vere Cotton, who died unmarried, and under the age of twenty-one, and consequently before her portion became payable, and is, whether that portion was transmissible and is now to be raised for the benefit of her representatives, or ought to sink into the estate for the benefit of the heir.

As to the first, I am of opinion that Sir Thomas Cotton could well charge the estate with interest upon these portions, upon the authority of the case of Lord Kilmurry v. Geery, 2 Salk. 538. and cited in 2 P.Wms. 671. 1 Eq. Ca. Ab. 341. pl. 4. and 2 Eq. Ca. Ab. 665. pl. 14., which was not the case of a portion, but only of a charge on land by way of security; and where there is a general power for raising portions, it seems in the nature of it to include that of giving interest, and where a father gives a legacy to a child, though he makes it not payable till twenty-one, or perhaps gives it not till then; yet, where the child has no other provision, this Court has gone so far as to give interest even before the vesting.

It was objected, that this was a power to charge the portions on the reversion only, which this Court has always been anxious to avoid doing, lest the estate in the hands of the heir should be over burthened. As to that, it is true that this was a charge on the reversion, because the estate produced only 600*l.* per annum, and was subject to a jointure of 500*l.* per annum, but the objection has no weight in the present case, because it does not appear to have been the object of the parties so much to preserve the estate, as to provide portions for the children, for there is no time of payment appointed, and no particular sum limited in the power. Portions therefore might have been charged to the whole value of the estate, and it must be immaterial to the heir whether the estate is exhausted by principal monies or interest.

As to the second point, I am of opinion that the interest became due annually: interest is given as a satisfaction for the postponement of the time of payment, and no precedent has been shewn of interest being directed to accumulate in the manner proposed in this case, nor is there any reason from the circumstances for such a construction here. Sir Thomas Cotton having a power to charge interest, must be supposed to have given it for the purposes of maintenance.

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As to the third point, I am of opinion that the portion of *Vere Cotton* upon her dying under age, and unmarried, sunk into the estate.

Jackson v. Farrand, an anomalous case.

The general rule in all such cases, excepting that of *Jackson v. Farrand*, 2 Vern. 424., which is anomalous, hath been that portions charged upon land, whether given with or without interest, and whether by deed or will, sink into the land upon the party's dying before the time of payment.

Cave v. Cave, no authority that the principal sum should be raised, as that point could not come in question in the cause.

It was contended that the giving interest upon this portion from the father's death made it *debitum in presenti*, and the case of *Cave v. Cave*, 2 Vern. 508. was cited for that purpose. As that case is there reported it certainly is in point, but upon searching the Register's Book, it turns out that it is no authority at all, because that point could not have been in question. The defendant, Sir *Thomas Cave*, having expressly admitted by his answer, that the 4,000*l.* given to *Charles*, who died, ought to be raised, and only insisted that no interest was payable, until the time at which *Charles*, if he had lived, would have been entitled to the portion, and so it was directed. I doubt, indeed, of the propriety of that direction as to the question of interest, because in the event of *Charles's* dying before the legacy was payable to him, it was expressly left over to be distributed amongst the grandchildren, and no time being specified at which it should be payable to them, I think that as to them it was a new legacy, and vested immediately upon the death of *Charles*, although he died before the time at which it was to be paid to him, but however that may be, the present question could not have arisen in that case, because the defendant admitted that the principal of the portion ought to be raised. The case of *Bruen v. Bruen*, 2 Vern. 439. and Pre. in Ch. 195. which last report exactly agrees with the Register's Book, is directly contrary to the supposed authority of *Cave v. Cave*, and much resembles the present case, for there maintenance was directed to be raised during the infant's life, although the principal was held to sink into the land. The case of *Tournay v. Tournay*, Pre. in Ch. 290. is also ex-

If a legacy is given to one, payable at a certain age, and if he dies, to another, without mentioning any age, if the first dies before the time of payment, it vests in the second immediately. (1)

(1) So *Laundy v. Williams*, 2 P. Wms. 478. *Roden v. Smith*, Amb. 588. *Crickett v. Dolby*, 3 Ves. 10. But if the representative of the deceased legatee is entitled to the legacy, he shall wait until such time as the legatee would have been entitled to it, in

case he had lived, *Chester v. Painter*, 2 P. Wms. 336. unless interest be given upon the legacy, in which case the representative may claim immediately, *Harrison v. Buckle*, 1 Str. 238. *Green v. Pigot*, 1 Bro. C. C. 105. *Crickett v. Dolby*, D. 3 Ves. 10.

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actly in point. It is true that the decree is not entered, but the minute book warrants the report, and the register, contrary to the usual practice, has taken down the saying of the Court, which exactly agrees with the report. I am therefore of opinion that Miss *Vere Cotton's* portion of 675*l.* ought not to be raised. Another question remains as to the interest of this sum during Miss *Vere Cotton's* life after her father's death, and I am of opinion, that this interest was given by way of maintenance, and that it ought therefore to be raised and paid to such person as has been at the expense of her maintenance, according to the case of *Bruen v. Bruen*, for she could not have less for maintenance than the interest of this sum. As to the time Mr. *John Salisbury Cotton* lived with the defendant, his brother, if it be insisted upon, I cannot help allowing something for maintaining him so long, for if a younger brother has a provision under a settlement, and lives with the elder, who is entitled to the estate so charged, he shall have an allowance for his maintenance, but in making this allowance, I cannot exceed the interest of the portion.

His Lordship declared, that Miss *Vere Cotton* dying before such time as her portion becomes payable, the principal sum of 675*l.* ought not now to be raised, but must sink into the estate charged therewith, for the benefit of the defendant Sir *Robert Salisbury Cotton* the heir at law, and did therefore order the plaintiff's bill, as far as it seeks to have the 675*l.* raised for the portion of Miss *Vere Cotton*, to be dismissed.

And as to the rest of the cause, decreed that it be referred to the *Master*, to take an account of what was due to the plaintiffs for their original portions of 675*l.* a-piece under the deed of the 27th of July, 1687, with interest for the same at 5*l. per cent.* from the death of Sir *Thomas Cotton*.

And his Lordship declared, that a reasonable allowance should be made for the maintenance of Miss *Vere Cotton* during her life, equal to the interest of her portion of 675*l.* at 5*l. per cent.* from the death of Sir *Thomas* her father, and did therefore decree the several sums before mentioned to be raised by the sale of the lands and premises comprised in the deed of the 1st of August, 1714, subject to the jointure of Lady *Philadelphia*; and out of the money arising by the sale, he decreed that the plaintiffs should be paid their original portions of 675*l.* together with interest for the same as aforesaid, and as to the portion of 675*l.* given to *John Salis-*

BOYCOT *bury Cotton*, he ordered that the same be divided into ten
v. equal parts, whereof one-tenth part was to be paid to the
COTTON. defendant, *Sir R. S. Cotton*, and one other tenth part to the
 defendant, *Lynch Salisbury Cotton*, another tenth part to
 the defendant *Cotton King*, and the remaining seven tenth
 parts to the plaintiffs. (1)

(1) Reg. Lib. A. 1738. fo. 306.

DUNN and Other Plaintiffs ;(1)
 and
COATES and BALGUY Defendants.

November the 24th, 1738.

1 Atk. 288.
 8 Vin. Ab. 337. **THE** defendants had instituted a suit in the Ecclesiastical
 pl. 9. S. C. Court, for a church rate, to which there was a custom pleaded
 2 Eq. Ca. Ab. of something done in lieu of the rate, and that plea ad-
 78. pl. 11. mitted.
 lb. 629. pl. 1.
 S. C.

This Court will not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, because they are capable of coming at that discovery themselves.

And now a bill is brought here for an injunction to stay the defendants' proceedings in the Ecclesiastical Court, and to be relieved against the rates, and to compel a discovery from the defendant *Balguy* of the value of the respective real and personal estates of the several inhabitants of the several parishes and places in the bill mentioned, and how the money collected by means of the said rates had been disposed of.

The defendants demurred to so much of the bill as sought to stay the proceedings in the Ecclesiastical Court by injunction, and also as to the discovery prayed thereby, as the matters contained in such part of the bill as they demurred to, were properly cognizable in the Ecclesiastical Court; and, if true, ought to have been insisted on there, or at common law, and was not a proper foundation for a bill in this Court.

(1) This case is taken from *Atkyns*, it is not to be found in *Lord Hardwicke's Note-book*.

LORD CHANCELLOR.—This Court will not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, because they are capable of coming at that discovery themselves.

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Where there
is a custom

pleaded to a suit in the Ecclesiastical Court for a church rate, and the plea admitted, they may proceed to try the custom, but if denied it is a ground for prohibition.

If there is a suit instituted in the Ecclesiastical Court for a church rate, and a custom pleaded of a certain sum in lieu of the rate, or something done in the room of it, and that plea admitted, they may proceed to try that custom in the same manner as a *modus*; but if the custom is denied, it would be a proper ground for a prohibition, *propter triationis defectum in curia ecclesiastica*, for the trying of the custom in the province of the common law.(2)

His Lordship was of opinion, it was a good demurrer, and therefore ordered that the same do stand and be allowed.(3)

(2) *Earl of Derby v. Duke of Athol*,
1 Ves. 203. *Anon.* 2 Ves. 451.

(3) Reg. Lib. A. 1738. fol. 49.

HARRISON v. OWEN.(1)

November the 25th, 1738.

THIS cause went off to an issue, to try whether certain mortgages were fairly cancelled by the mortgagee, or whether, if a mortgage is found cancelled in the possession of the mortgagee, it is as much a release as cancelling a bond. 1 Atk. 520.

(1) This case is taken from *Atkyns*; it appears in Lord *Hardwicke's* Notebook under the name of *Harris v. Owen*, and the parties to the suit were

ARTHUR HARRIS and THOMAS HARRIS, Executors of EDWARD HARRIS deceased, who was one of the Execu- tors of ARTHUR HARRIS CLERK deceased	} Plaintiffs;
and	
SALEM OWEN, Executor and Devisee of HENRY RO- BERTS deceased, and RICHARD MASSARY and JOHN MASSARY	} Defendants.

THE object of the bill was to have a due to the plaintiffs, as representatives satisfaction of several sums of money of *Arthur Harris* and *Edward Harris*,

HARRISON ther they were fraudulently and by stealth carried away by
v. the mortgagor, and the seals cut off by him.

OWEN. The *Lord Chancellor* said in this cause, that if a mortgagee cancels a mortgage, and it is found so in his possession, it is as much a release as cancelling a bond, but it does not convey or revest the estate in the mortgagor, for that must be done by some deed.

on bonds and mortgages, and to compel the defendant *Owen* to redeem or be foreclosed.

The defence set up by *Roberts* was, that *Edward Harris*, shortly before his death, with whom he was on terms of great intimacy, cancelled the mortgage deeds, and delivered them up to *Roberts* by way of present or free gift.

The mortgage deeds were, on the death of *Edward Harris*, in the possession of *Roberts* cancelled; but they were proved, shortly before *Edward Harris's* death, to have been locked up partly in a chest in his bed-chamber, and partly in a bureau in his study.

The cause came on before his Lordship upon an appeal from an order of the *Master of the Rolls*, who, by an order of the 30th June, 1738, ordered that the plaintiff, and the defendant *Owen*, should proceed to a trial at law

on this issue, whether the said *Edward Harris* cancelled the following deeds: an indenture of the 23d of November, 1717, an indenture of the 25th of December, 1722, an indenture of the 11th of January, 1724, and certain indentures of lease and release of the 29th and 30th days of May, 1733, in the answer of the late defendant *Henry Roberts* mentioned, and the said defendant *Owen* was to produce the said deeds at the trial. The plaintiffs appealed from this order, on the ground that no such issue ought to have been directed; but that they were entitled to the relief prayed by their bill, without the trying of any such issue. But his Lordship affirmed the order with this addition, that the defendant *Owen*, at the trial of the issue, should admit that no money or other consideration was paid by the said *Henry Roberts* for cancelling the said mortgage deeds. (1)

(1) Reg. Lib. A, 1738, fol. 141.

MICHAELMAS TERM, 1738.

BOWER v. SWADLIN. (1)

AN obligee gave a release to one of the obligors in a bond, the bill brought by the representative of the obligee, and likewise by a trustee under the assignment of this bond, for the sum conditioned to be paid by the bond.

The defendant insisted, by way of plea, that a release to one obligor is a release to all.

LORD CHANCELLOR.—There is no doubt but a release of one obligor is a release in equity to both, as well as in law; but if there be an assignment of the bond in trust for the benefit of others, precedent to the release, though the assignment be with or without consideration, it will be a material question, whether the obligee could release, or if it could operate to the releasee, as he must be presumed to have notice of this assignment, being himself a trustee in the assignment, and every man is supposed to be conusant of a deed to which he is a party.

leasee, as he is a trustee in the assignment. Every man is supposed to be conusant of a deed, to which he is himself a party.

His Lordship directed that the cause should stand over till the defendant had answered to the date of the release; for it does not appear at present, whether the release was precedent or subsequent to the assignment.

1 Atk. 294.

A release to one obligor is a release to both in equity as well as at law. (2)

Where there is an assignment of a bond in trust for others, precedent to a release, though without consideration, it will be a material question, whether the obligee could release, or if it could operate to the re-

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.

(2) 2 Roll's Abr. 412. G. 4. 5. Shep.

Touch. 335. Har. Co. Lit. 232. a. n. 1. *Skip v. Huey*, 3 Atk. 91. Ex parte *Smith*, 1 P. Wms. 237. *Hawkshaw v. Parkins*, 2 Swans. Rep. 539.

EDWARD RUSSELL, WILLIAM HAY- }
 WARD, and Others } Plaintiffs ; (1)
 and
 ELIZABETH HAMMOND and Others . Defendants.

November 25th or 27th, 1738.

1 Atk. 13.

German Hammond being tenant for life of a freehold, and a leasehold estate called *Ford*, with remainder to his son in tail, and being absolutely entitled to another leasehold estate, joins with his son after his marriage in making three settlements of the three different estates, all the settlements being of the same date ; By the first settlement, in consideration of 200*l.* part of the wife's portion paid by her father, they join in settling upon the son and his wife, and the issue of the marriage, the freehold estate ; By a second settlement, in consideration of 100*l.* being the residue of the portion paid soon after the execution of the settlement, they make the same settlement of the *Ford* estate ; And by a third settlement, the other leasehold estate in which *German Hammond* had an absolute interest, was assigned upon trust, to secure *German Hammond* and his wife an annuity of 25*l.* during their joint lives, and after the death of one of them, to pay 13*l.* to the survivor, and subject thereto to the son and his wife for their lives, with remainder to such uses as the survivor might appoint ; The father and son being both indebted at the time of the execution of these settlements, it was held that the first and second settlements were not within the statute of the 13th of Eliz. c. 5. fraudulent as against their creditors, but that the third settlement was fraudulent against their creditors, there being no pecuniary consideration to support it, and the father's reservation of an annuity to the value of the leasehold estate being a strong badge of fraud.

THE defendant, *Elizabeth Hammond*, intermarried with *William Hammond*, her late husband, in 1720, but the marriage being without the consent of *Thomas Stedman*, her father, he refused to give her any portion, but afterwards, *William* and *German Hammond*, his father, offering to make a settlement upon her, *Thomas Stedman*, her father, agreed to give 300*l.* as her portion, and accordingly, by indentures of lease and release of the 16th and 17th of April, 1722, in consideration of 200*l.* a freehold estate was settled upon *William Hammond* for life, remainder to the defendant *Elizabeth* for life, remainder to the first and other sons of the marriage in tail male, remainder to the right heirs of *William Hammond*, and by another indenture of the 17th of April, 1722 (being the same date as the release) in consideration of 100*l.* then in hand paid or secured, to be paid by

(1) This case is taken principally from *Atkyn's* with some alterations and additions from Lord *Hardwicke's* Note-book. A material alteration is made in the statement of what his Lordship is made to say, relative to settlements, where the father is tenant for life, remainder to the son in fee, in

contradiction to the case where the father is tenant for life, remainder to the son in tail. That this is a proper alteration appears not only from the sense and context, but from another manuscript report found amongst his Lordship's papers.

Thomas Stedman, and of the marriage already had, a leasehold estate called *Ford*, was assigned by *German* and *William Hammond*, to trustees upon trust for *William Hammond* for life, and the said *Elizabeth* during her life, remainder to the issue of their two bodies for life, remainder to the executors and administrators of the survivor. And by a third indenture of the same date, in consideration of the marriage already had, and for settling and assuring the estate, and for divers other good considerations, another leasehold estate was assigned to trustees upon trust to secure to *German Hammond* and his wife 25*l. per annum*, during their joint lives, and after one of their deaths, to pay the survivor 13*l. per annum*, and subject thereto for *William Hammond* for life, remainder to the defendant *Elizabeth*, his wife, for life, remainder to such uses as they or the survivor of them shall appoint.

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It appeared that *German Hammond* was tenant for life of the freehold estates, remainder to *William Hammond* in tail, and that he was likewise tenant for life of the leasehold estate called *Ford* (which was a leasehold for lives) with remainder to his son in tail. (2)

The leasehold estates conveyed by the third indenture were leaseholds for lives belonging to *German Hammond*, the father, and of which no settlement upon the son had been made.

At the time of these deeds being executed, both the father and son were in debt. The 100*l.* stated as the consideration for the settlement called *Ford*, was not paid at the time, but was paid soon afterwards. *German* and *William Hammond* were both dead, the latter leaving the defendant, his widow, and four children.

The bill was brought by the creditors of *German* and *William Hammond*, and sought to set aside these three settlements as fraudulent and void against creditors, and to have satisfaction for their demands out of the estates thereby settled.

(2) Mr. *Sanders*, in his edition of *Atkyns*, states, in his note to this case, that it does not appear in the Register's book, that the son was entitled to the reversion in tail of the *Ford* estate, and says, "Indeed Lord *Hardwicke's* reasons respecting the *Ford* estate seems rather to apply to freehold than leasehold." It is true that it does not appear

in the Register's book which states Lord *Hardwicke's* decree in this cause; but it appears in the Register's book, (where the decree of the *Master of the Rolls* is stated) that the son was tenant in tail of the *Ford* estate, and that the *Ford* estate was a leasehold for lives, see Reg. Lib. B. 1734. fo. 130.

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Upon the hearing of this cause, on the 25th Feb. 1734, before the *Master of the Rolls*, his Honour declared the settlement of the leasehold estates to be fraudulent and void against creditors, and that so much of the bond debts of *German* and *William Hammond* as their respective personal estates would not extend to pay, should be discharged out of their respective interests in such leasehold estates, but he dismissed the bill without costs, so far as it sought to impeach the settlement of the freehold estate. From so much of the decree as affected the settlement of the leasehold estates, and because it did not give her the costs of the suit, so far as it sought to impeach the settlement of the freehold estate, the defendant, *Elisabeth Hammond*, appealed.

Mr. *Chute*, Mr. *Fazakerley*, and Mr. *Smith*, in support of the appeal, cited *Osgood v. Strode*, 2 P. Wms. 245. Sir *Ralph Bovy's* case, Ventr. 194. *Louder v. Blockston*, 2 Lev. 147. *Scott v. Bell*, 1 Lev. 71. and 3 Heb. 82. *Kirk v. Clark*, Pre. in Ch. 275. Styles Rep. 446. and *Cook v. Lord Fauconberg*, cor. *Talbot*, Ch. about 1735, where a father being tenant for life, remainder to the son in tail, joined in suffering a recovery and settling the estate upon the marriage of the son; and in default of issue of which marriage, it was settled upon collateral branches of the family, and it was held that they took as purchasers for a valuable consideration.

Mr. *Attorney-General* and Mr. *Browne*, in support of the decree, insisted that there was no case in which a voluntary settlement made by a person indebted at the time had been held good against creditors, and that the 100*l.* stated to be the consideration for settling the leasehold estate called *Ford*, not having been paid or secured at the time, that settlement was purely voluntary, and could not be confirmed by the subsequent payment, which might be only colourable.

Between Nov.
25th and Dec.
5th, 1738.

LORD CHANCELLOR.—There is no evidence whatsoever in the cause to impeach the settlements of actual fraud.

But what the plaintiffs insist on is, that *German Hammond* was largely indebted at the time of making the settlements on *William* the son, and that therefore these settlements were fraudulent upon the statute of the 13th of *Eliz.* ch. 5. which regards creditors only.

I must consider this Act of Parliament as it would have been considered at law, for I will not lay down any other rule of construction, in equity, than is followed at law upon this statute.

What is prayed by the creditors, is the application of these leasehold terms as assets for the satisfaction of their debts. The present is a case of general creditors, and not of mortgagees, judgment creditors, or purchasers; and therefore not so strong as where a man has paid his money for the same estate; which would have brought it within the statute of the 27th of Eliz. cap. 4. which makes every conveyance made with the intent to defraud purchasers, for a good consideration, to be utterly void.(1)

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There are three settlements in question, the first of a freehold estate, the second of a leasehold estate called *Ford*, and the third of another leasehold estate.

William Hammond the son married the daughter of one *Stedman*, without the consent of the fathers of either side; no articles or settlement were made before the marriage; *Mr. Stedman* afterwards proposed to *German Hammond* to give 300*l.* as a portion with his daughter, if he would make an adequate settlement; afterwards a kind of survey was taken of the premises proposed to be settled, and therefore the settlement was not merely colourable.

The consideration for settling the freehold is 200*l.* paid; there is no pretence to impeach this, it is as fair a transaction as can be.(2)

The second is a settlement of the leasehold estate called *Ford*, made in consideration of the marriage already had, and for the consideration of 100*l.* paid, or secured to be paid.

The question is, whether this shall prevail against the creditors of *German* as a good settlement.

A great deal has been said upon this head, but it depends upon circumstances, and every case varies in that respect.

that reason fraudulent, but an evidence of fraud only, though hardly a case, where the person conveying was indebted at the time, that it had not been deemed fraudulent.

A settlement being voluntary, is not for where the person

There are many opinions that every voluntary settlement is not fraudulent; what the Judges mean is, that a settlement being voluntary is not for that reason fraudulent, but an evidence of fraud only, *Bovey's* case, in 1 Vent. 193. and *Lord Teynham v. Mullins*, 1 Mod. 119; though I have hardly known one case where the person conveying was indebted at the time of the conveyance, that has not been deemed fraudulent. There are, to be sure, cases of voluntary settle-

A voluntary settlement is not fraudulent, where the person making is not indebted at the time, nor will subsequent debts shake such settlement.

(1) So *Buckle v. Mitchell*, 18 Ves. 110. *Pulvertoft v. Pulvertoft*, 18 Ves. 479.
84.

(2) *Stileman v. Ashdown*, 2 Atk.

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ments that are not fraudulent, and those are, where the person making is not indebted at the time; in which case subsequent debts will not shake such settlement.(3)

But I will not enter into a nice disquisition, whether every voluntary settlement is or is not fraudulent? because I think, as to the *Ford* estate, there was a valuable consideration, upon the face of the settlement, for the father was tenant for life, and the son entitled to the reversion in tail.

And where father and son join in a marriage settlement, it is a bargain for a good valuable consideration, and has been so held in several cases; but then the question is, whether it has been extended to creditors.

In the present case, the son could not have settled the residuary interest, without the father's help, because he was tenant in tail in reversion, and not in possession; but if the father had been tenant for life, and the son tenant in fee, and had joined in such settlement, it would have made a material difference, for then I should have thought this not good against creditors; for there was no occasion for the son's joining, as the son might have disposed of the residuary interest without him.

I am of opinion besides, here is a fair pecuniary consideration, as there was a sum of money paid, amounting to 100*l.*, by *Stedman* to *German Hammond*, and, when paid, expressed to be on account of the third 100*l.*, agreed to be given by *Stedman* as a portion, and no other account appears to have passed between *Stedman* and *Hammond* but this.

As to the assignment of the other leasehold estate, it is of a very different nature; for it is expressed to be in consideration of the marriage, and divers other good considerations.

(3) So *Shaw v. Lady Standish*, 2 Vern. 326. *Middlecome v. Marlow*, 2 Atk. 518. *Lord Townshend v. Windham*, 2 Ves. 10. *Stephens v. Olive*, 2 Bro. Ch. Ca. 90. *Mathews v. Feaver*, 1 Cox. 278. *Lush v. Wilkinson*, 5 Ves. 384. *Kidney v. Coussmaker*, 12 Ves. 136. *Holloway v. Millard*, 1 Madd. 414. *Partridge v. Gopp*, 1 Eden, 163. *Battersbee v. Farrington*, 1 Swanst. 106. Otherwise if indebted at the time, *Beaumont v. Thorp*, 1 Ves. 27. *Mathews v. Feaver*, 1 Cox. 278, or if a man make a settlement with a view to his being indebted at a future time, D. per Lord Hardwicke, *Stileman v. Ashdown*, 2 Atk. 481. *Fitzer v. Fitzer*, ib. 511. *Taylor v. Jones*, ib. 600. But an assignment of copyholds (not being subject to debts) cannot be fraudulent against creditors, *Mathews v. Feaver*, 1 Cox Cases 278. But *Quære* whether an assignment of stock or of choses in action, can be fraudulent against creditors, see *Taylor v. Jones*, 2 Atk. 600. *Horn v. Horn*, Amb. 79. *Dundas v. Dutens*, 1 Ves. jun. 198. *Grogan v. Cooke*, 2 Ba. & Be. 233.

All the deeds bear date the same day, and it is insisted it is inartificial to split them into three.

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But I cannot think it is so here ; for they have made the consideration of the freehold 200*l.*, and of the *Ford* estate 100*l.*, and I cannot take in the consideration of those deeds, which have a *quid pro quo*, and a consideration of their own, to support a third deed.

But in the last settlement there is a plain badge of fraud, for *German Hammond* took back an annuity to himself and his wife for life of 25*l.* which probably was the full value of the estate comprised in this deed, and therefore gave the son nothing ; which is almost tantamount to a continuance in possession, and has always been deemed a strong circumstance of fraud. (1)

Where a father takes back an annuity to the value of the estate comprised in the settlement, it is tantamount to a continuance in possession ; and creditors will be relieved against such settlement.

Therefore I am of opinion the creditors ought to be relieved against this settlement.

The decree was made in February 1734, very near four years ago, and if I should enter into the consideration of costs, I doubt I must give the plaintiffs costs before the Master, and though the bill, as to two of the matters, has no foundation for relief, yet as to a third part, *viz.* the last settlement, it is as clearly for the plaintiffs ; therefore, for all parties, it will be better to drop the costs.

His Lordship therefore ordered that the said decree be affirmed, save as to that part thereof as relates to the settlement of the said leasehold estate called *Ford*, and as to the plaintiff's bill, so far as it seeks to impeach the settlement of that leasehold estate, and to make the same liable to the plaintiff's demands ; his Lordship doth order that the same be likewise dismissed out of this Court without costs.

And as to the costs of the rest of this suit, that the said decree whereby the same are reserved till after the said report, be varied as follows :—That to the time of hearing this cause at the Rolls, no costs be paid on either side, but that the consideration of costs of such other parts of this cause from the hearing, be reserved till the Master shall have made his report, the ten pounds deposit to be paid back to the defendant. (2)

(1) *Twyne's case*, 3 Co. 80 b. *Taylor v. Jones*, 2 Atk. 600.

(2) Reg. Lib. B. 1738. fol. 209.

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and

SANDYS *v.* DIXWELL.

and

PYOTT *v.* DIXWELL. (1)

December 8th, 1738.

1 Atk. 607.
2 Ves. 652.

Sir R. S., by his will, devises certain estates to trustees upon trust, subject to certain charges, to convey one fourth part thereof in trust for the separate use of his daughter *Priscilla*, for her life, and so as she alone or such persons as she should direct, might receive the rents and profits thereof to her sole and separate use, her husband not to

intermeddle therewith, and after her decease, in trust for the heirs of the body of the said *Priscilla*, for ever; and also upon trust to convey the remaining three-fourths to his other three daughters, and the heirs of their bodies; and he declared that if any of his daughters should die without heirs of their bodies, the part or share of her or them so dying, should be conveyed to the use of his surviving daughters, equally to be divided, and the heirs of their bodies, but the share of his daughter *Priscilla* to be conveyed in trust, as aforesaid, and if all his daughters died without issue, and there should be no issue left of his body, then to his own right heirs for ever.

Priscilla having died, leaving a husband and two sons, and part of the lands devised being gavelkind; held that *Priscilla* took only an estate for life in the lands devised to her, the trusts as to her being merely executory, and that her eldest son took as purchaser an estate tail, both in the gavelkind lands, and lands in socage.

And where a testator having a son and a daughter in pursuance of a power by which he is authorised to appoint, a real estate to the use of his children for such estates, and in such shares and proportions as he should direct, by his will appoints the real estate to his son in fee, upon condition that he should pay to his sister 3,000*l.*, wherewith he charged the estate; held, that though the direct terms of the power are not pursued, that the intent and design of it are; and that such appointment to his daughter was a good execution of his power.

(1) The statement of this case, and the decree, are taken from the proceedings in the cause, the arguments of

counsel from Lord *Hardwicke's* Notebook, and the judgment from a manuscript report.

to his said daughters *Ann* and *Elizabeth*, were not to be made until the time of their respective marriages; and if either of them should during the lifetime of their aunt *Priscilla* and *Sarah Rolle*, marry without their consent, then the part or share of her so marrying, should not be conveyed to her or the heirs of her body, but unto his said other daughters, or such of them as should not marry without such consent, equally to be divided, and the heirs of their bodies, and if any of his said daughters should die without heirs of their bodies, the part or share of her or them so dying should be conveyed to the use of his surviving daughters, equally to be divided, and the heirs of their bodies; but the part and share of his daughter *Priscilla*, to be conveyed in trust as aforesaid, and if all his said children died without issue, and there should be no issue left of his body, then to his own right heirs for ever.

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The testator afterwards mortgaged the whole of this estate.

By the settlement made previous to the marriage between *Mary Sandys*, one of the daughters of Sir *Richard Sandys*, and *William Roberts*, the father and mother of the plaintiff, and of the defendant *Elizabeth Mary Roberts*, dated the 12th of July, 1722, *William Roberts* covenanted in case there should be one or more children besides an eldest or only son, then that he would either in his lifetime, or at his decease, give or leave to such child or children, the several sums of money following: That is to say, if but one, 1,000*l.*, if two, 1,500*l.*, and if three or more, 2,000*l.*, to be equally divided between them.

Subsequently to the marriage, and after the death of Sir *Richard Sandys*, by indenture of the 17th of January, 1726, *William Roberts* covenanted that he and his wife would levy fines of the third part or share of the real estates, to which his wife *Mary* was entitled under the will of her father, Sir *Richard Sandys*, which said fines were declared to be to the use of the said *Mary Roberts* for life, remainder to *William Roberts* for life, and after the decease of the survivor of them to the use of such of the children of that marriage for such estates, and in such shares and proportions as the said *William* and *Mary*, his wife, should by any deed or writing to be by them duly executed in the presence of two or more credible witnesses direct, and for want thereof to such of the said child or children as the survivor of them should in like

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manner direct, and for want of such last mentioned appointment, to certain other uses.

The fines were accordingly duly levied.

Mary, the wife of *William Roberts*, having died without any appointment having been made in pursuance of the power reserved in the above indenture, and *William Roberts* by his will dated the 22nd of January, 1735, after reciting the above indenture, and the powers thereby vested in him and his late wife, and the survivor of them, and that no appointment had been made by him and his wife; did, by that, his will, in pursuance of the said power, limit and appoint the said undivided third-part of the lands, &c. in the said indenture and fines mentioned unto his only son, the plaintiff, *Robert*, his heirs and assigns for ever, upon condition that he should pay to his sister of the whole blood, the defendant *Elizabeth Mary Roberts* 3,000*l.*; and upon this further condition that he should pay 50*l.* a-year maintenance, until she attained twenty-one, or married. And the said testator charged the said undivided third-part, with the payment of the said 3,000*l.*; and in case the plaintiff should refuse to pay the same, he limited and appointed the said undivided third part unto the defendant *Elizabeth Mary Roberts*, her heirs and assigns for ever; and he declared his mind to be, that 1,000*l.* part of the said 3,000*l.* was in full satisfaction of the 1,000*l.* which he stood engaged to pay to his daughter *Elizabeth Mary Roberts* by his marriage settlement, as the only child of that marriage living at the time of his death, and that 2,000*l.* residue of the said 3,000*l.* should be paid to the defendant *Elizabeth Mary Roberts*, at twenty-one or marriage, but that if she should die before, then that the said 2,000*l.* should be paid by the plaintiff to the defendant, *Mary Roberts* (the testator's daughter by a former marriage) at twenty-one or marriage; and he gave the residue of his personal estate equally between his two daughters.

These causes embraced a great variety of objects, and, amongst others, the following questions were argued and decided under the will of Sir *Richard Sandys* :—

1st, Whether under that will *Priscilla* was tenant in tail of the lands devised to her, and her husband entitled to be tenant by the curtesy? and she having left two sons, *Richard* and *Henry Sandys*, and part of those lands being of gavelkind tenure, whether the gavelkind part of those lands were to go to the eldest son as heir at common law, or were to descend according to the custom?

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2dly, Under the will of *William Roberts*,

1st, Whether his will was a good execution of the power reserved by the indenture of the 17th of January, 1726?

2dly, Whether the covenant in the marriage settlement as to the provision for younger children was satisfied by the will?

Upon the first question as to what estate *Priscilla Sandys* took under her father's will, it was contended by Mr. *Attorney-General* for *Richard*, the eldest son of *Priscilla*, that *Priscilla* took only an estate for life, and that her eldest son was entitled to have an estate in tail conveyed to him as a purchaser, and that consequently the husband of *Priscilla* was not intitled as tenant by the curtesy. That *Henry*, the second son had no title as co-heir to the gavelkind lands, because the heir, who takes by purchase must be heir by common law. There is no legal estate given to the wife, but only an executory trust, and an express estate for life directed for her; if a conveyance had been made in her lifetime, it must have been to trustees for her benefit, for the purpose of excluding the husband; it would have been to trustees and their heirs during the life of *Priscilla*, in trust for her separate use, remainder to the heirs of her body, in which case the heirs of the body would have taken as purchasers. Lord *Say and Seal's* case, 3 Bro. P. C. 458. In the case of Lord *Glenorchy v. Bosville*, Ca. Temp. Talb. 3., the Court acting upon an executory trust, directed an estate for life, though the words in the case of a legal estate would have made an estate-tail. In *Papillon v. Voice*, 2 P. Wms. 471., the devise was of money to be laid out in land to *A.* for life, remainder to trustees to preserve contingent remainders, and then to the heirs of the body, and it was held to give an estate for life only to *A.*, and so was executed in strict settlement.

But supposing *Priscilla* to have had an estate-tail under the will, yet her husband is not entitled as tenant by the curtesy. To create that estate there must be an actual seisin during coverture. It is considered as initiate during her life, for after the birth of a child, the husband may alone do homage, Co. Litt. 29 b. 30—124. It is a continuation of her estate, but in this case he is expressly excluded from all interest during his wife's life, as to that estate the wife is to be considered as a feme sole.

Mr. *Fazakerley* and Mr. *Legg* for *Henry*, the younger son contended, that *Priscilla* took an estate-tail under the

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will, and that the estate therefore descended to the heirs, according to the custom of gavelkind.

If this had been a devise of a legal estate, it would clearly have created an estate-tail; the construction in equity must be the same of a trust executed, and so where the trust is executory, unless it can clearly be shewn that the testator's intention will thereby be defeated; but in this case there is reason to suppose that the testator intended to create an estate-tail, because he has directed immediate estates-tail to be conveyed to his other daughters, and the only object which he seems to have had in view in varying the devise to his daughter *Priscilla* was to exclude her husband from any benefit, but that provision will not alter the nature of the estate, Co. Litt. 378 b. We join in contending that the husband has no claim to the tenancy by curtesy, but insist that the wife nevertheless was tenant in tail, her husband being expressly excluded from any benefit, there is no reason for supposing that the testator intended to alter the course in which the estate would descend; and yet if the mother was only tenant for life, the second son will be excluded. In *Backhouse v. Wells*, 1 Eq. Ca. Abr. 184. pl. 27. the words were for life only; but Lord Ch. J. *Parker* said, that if the limitation had been to the heirs of the body, and not to the issue, the legal force of those words would have been such that the estate would have been an estate-tail. In Lord *Glenorchy v. Bosville*, the decision proceeded upon the ground that the estate for life was to be without impeachment of waste, except voluntary waste in houses.

Mr. *Idle*, for the husband, contended, that though there was no actual seisin of the husband during the life of the wife, yet that the right to the curtesy was not thereby invalidated, for that it prevailed in all cases of trusts, though there can be no actual seisin, and cited *Broughton v. Langley*, 2 Salk. 679. *Sweetapple v. Bindon*, 2 Vern. 536. *Williams v. Wray*, 1 P. Wms. 137. and 2 Vern. 680. S. C. *Casburne v. Inglis*, ante p. 221.

As to the second question upon the will of *William Roberts*, it was contended by Mr. *Browne*, on behalf of the plaintiff *Roberts*, who claimed the estate of *Mary Roberts*, which was settled by the deed of the 17th of January, 1726, that the power reserved by that deed was not well executed by the will of *William Roberts*, so far as related to the 3,000*l.* given to *Elizabeth Mary Roberts*, for that the power was to appoint to the uses of the estate, and not to grant a

rent charge out of it, that the contingent appointment of 2,000*l.* part of the 3,000*l.* in favour of *Mary Roberts*, the testator's daughter by a former wife, was clearly beyond the power and that the appointment of the 1,000*l.* of her part of the 3,000*l.* was wholly bad, being in satisfaction of the testator's debt, or if valid, that the plaintiff *Roberts* was entitled to stand in the place of *Elizabeth Mary Roberts*, and to claim that sum under the covenant.

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Mr. Noel and Mr. Clarke, for *Elizabeth Mary Roberts*, insisted that she was entitled to the 3,000*l.* under the appointment, and to the 1,000*l.* under the covenant, for that the former could not be considered as a satisfaction of the latter, because it was not competent to the testator, so to satisfy his debt, and because the thing given in satisfaction must be of equal value, but that the title to this 3,000*l.* depended upon a contingency, because a fine only having been levied, and no recovery having been suffered, the remainders over would not be subject to the 3,000*l.* if the base fee should determine; that the execution of the power was good in itself, the granting a rent charge being a good execution of a power to appoint to the uses of land, and for this purpose they cited *Thwaytes v. Dye*, 2 Vern. 80.

LORD CHANCELLOR.—In this case, all is executory, and the estate to be conveyed to the trustees is to be a trust estate. The question is, how this executory trust is to be carried into execution, and what kind of estate the trustees ought to convey, whether an estate tail to *Richard Sandys* as a purchaser, or an estate tail to *Richard* and *Henry Sandys*, as co-heirs in gavelkind to their mother *Priscilla*? and this depends upon a previous question, namely, what estate ought to have been conveyed to *Priscilla*, if the conveyance had been made in her lifetime, whether an estate in tail or for life only? It is clear that such an estate ought to have been conveyed to her as would best have answered the testator's intention, as it is to be collected from his will. If an estate tail would support the intention, that estate ought to have been conveyed, but if the conveying that estate would have defeated the intention, as I think it clearly would, then only an estate for life. The words of the will are that the trustees should convey one-fourth of the estate in trust for the separate use of the testator's daughter *Priscilla* for her life, and so as she alone, or such persons as she should direct, might receive the rents and profits thereof to her sole and separate use, and her husband not to intermeddle there-

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Where there is a devise to one for life, and after his decease, to the heirs of the body. The first taker takes an estate tail; so in the case of a trust actually executed, but where the trusts are merely executory, and something remains to be done to perfect the testator's intention, the Court is not governed by the strict rules of the common law, but governs itself by the testator's intention. (1)

with. These words give her an express estate for life, but that is not so in the devise to the other daughters, and the difference in the manner in which these devises are expressed, strongly implies a difference of intention as to what estate each daughter was to take. It is true, that where there is a devise of a legal estate to one for life, and after his decease, to the heirs of his body, the first taker according to the rule in *Shelley's* case, takes an estate tail, and so undoubtedly it would be in the case of a trust actually executed, for then equity follows the law, and whatever estate the party would have had in case of a devise of the land, he is entitled to in the case of a devise of the trust of it, but where the trusts are merely executory, and something remains to be done to perfect and carry into effect the testator's intention, the Court is not confined to the strict rules of common law, but governs itself by the testator's intention, and does that which will best answer and support it. For this purpose, limitations to preserve contingent remainders have been inserted by this Court, though none were directed by the will, as was done by Lord *Cooper* in the case of Sir *John Maynard's* will, *Stamford v. Hobart*, 1 Bro. P. C. 288. Upon this ground, the Court provided in the cases of *Papillon v. Voice*, 2 P. Wms. 471. and Lord *Glenorchy v. Bosville*, cas. temp. *Talbot*, 3. though in the latter there could have been no doubt, but that if a legal estate or a trust executed had been devised, Lady *Glenorchy* would have been tenant in tail, yet on account of circumstances, shewing the testator's intention to make her only tenant for life, the Court pursuing that intention, decreed her only that

(1) This distinction between trusts executed and trusts executory is clearly established, *Leonard v. Earl of Sussex*, 2 Vern. 526. Lord *Stamford v. Hobart*, 1 Bro. P. C. 288. *Papillon v. Voice*, 2 P. Wms. 471. Lord *Glenorchy v. Bosville*, Ca. Temp. *Talbot*, 3. *Baskerville v. Baskerville*, 2 Atk. 281. *Wright v. Pearson*, 1 Eden's Rep. and Amb. 358. *Green v. Stephens*, 17 Ves. 64. and that Lord *Hardwicke* denied such distinction to exist, as stated in *Bagshaw v. Spencer*, 2 Atk. 577. is contradicted by Lord *Hardwicke* himself, who says "I did not there say no weight was to be laid on that distinction," *Exel v. Wallace*, 2

Ves. 323. and see *Garth v. Baldwin*, 2 Ves. 656. and seems to be contradicted by Lord *Northington*, who admits the distinction, and says, "Lord *Hardwicke's* determination in *Bagshaw v. Spencer*, was as right, sound, and certain as his different determination was in *Garth v. Baldwin*," see *Le Rousseau v. Rede*, 2 Eden's Rep. 6. see *Fearne's* Contingent Remainders, et seq. and see Mr. *Fonblanque's* Treatise on Equity, vol. 1. 418. and *Maddock's* Chancery Practice, vol. 1. 588. et seq. see also *Synge v. Hales*, 2 Ba. & Be. 499. *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 559.

estate. Thus in all these cases, the intention has uniformly been observed ; in this case the intention is clear, the conveyance directed is for *Priscilla* for her life, for her separate use ; now if such instructions were to be given for a settlement, no one, I apprehend, would limit an estate tail to the wife for her separate use, but only to her use for life, and afterwards to her children, and the subsequent words, *where-with the husband is not to intermeddle*, do in common sense and understanding denote such a settlement wherein the husband was to have neither interest nor power, but that immediately upon the wife's decease, which is the meaning I put upon the words " after her decease," the same should remain to the heirs of her body. It may indeed be said, that these words were intended only to exclude the husband from taking the profits during his wife's life, but I think they go much further, and not only exclude him from meddling with the profits, but from having any thing to do with the estate.

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If the wife had been tenant in tail, I think that the husband would have been entitled as tenant by the curtesy. It has been urged, that whilst the trust remained executory, the wife had no seisin out of which the husband's right to the curtesy could arise, or that if she had, yet that the husband being excluded from all participation during her life, had not such an interest as would entitle him to the curtesy, that estate being considered as initiate upon the birth of a child ; but it has been settled that there may be a tenancy by the curtesy of a trust estate in general, and of an equity of redemption, and of a trust for the payment of debts ; (1) why, therefore, may it not as well take place in case of a trust of an equity of redemption, which is this case ? As to the seisin, if the wife had been tenant in tail, she would have been as much seised of this as she could have been of any other trust estate ; and Lord *Coke* does not say, that the husband must receive the profits, but only that the wife must be seised ; and I think that the husband must have been tenant by the curtesy of this trust estate, in imitation of the law, by which, had this been a legal estate, the wife would have been actually seised ; for if a legal estate be devised to a woman for her separate use, and after her death, to the heirs of her body, by which she would take an estate tail,

If an estate be
devised to a
woman to her

separate use, and after her death to the heirs of her body, the wife would take an estate tail. (2)

(1) See *Casburne v. Inglis*, ante page 221.

(2) See *Fearne's Contingent Remainders*, 6th Edit. p. 54. 201.

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the husband could not meddle with the profits during her life, but he would nevertheless be seised of the freehold in her right, as a trustee, as after her decease he would hold by the curtesy, that being one of the incidents to every estate tail; and in that case, the husband and wife together might have suffered a recovery, and so have barred the remainders over; and so they might in equity, in case of a trust estate. If, therefore, in this case, the wife had been tenant in tail, the intervention of the husband's estate would have postponed the title of the issue, which it was, I think, the testator's intention should take place immediately upon the decease of the wife; or the husband and wife together might have entirely defeated their title, although it was expressly provided that the husband should not at all intermeddle with the estate.

I think from these circumstances that it was the intention of Sir *Richard Sandys* to give only an estate for life to *Priscilla*.

The only question which remains is, whether the alteration of the course of descent of the gavelkind lands will vary the construction which I have put upon the will, and I think that it will not, for this is only a consequence of pursuing the testator's intention, which in my opinion is plain upon the other parts of the will; besides, in this case, socage and gavelkind lands are intermixed, and I know of no rule which warrants a different construction upon each, when the intention is the same as to both. It is said, that by these means the second son will be deprived of all his claim to the land, although as much heir, according to the custom, as the eldest son. But, as I said before, this is only a consequence of vesting the estate by purchase in the children; and the second son will not be entirely deprived, for he will have a remainder in tail after the decease of his brother without issue. As to the other point, upon the execution of the power, it is true that the direct terms of the power are not pursued, but the intent and design of it are. It is admitted, that the father might have appointed part of the estate to be sold, and have directed the application of the money to arise from such sale.(3) It is the same to the heir or remainderman which way the child is to be provided for; but giving a portion of the estate might be the means of tearing it to

(3) *Long v. Long*, 5 Ves. 445. *Kenworthy v. Bate*, 6 Ves. 793. *Bullock v. Fladgate*, 1 Ves. & Be. 471.

pieces, whereas now the estate will be kept entire, and it is better for the daughter that she should have a sum of money than a small estate. The case of *Thwaytes v. Dye*, 2 Vern. 820, is a strong authority upon this subject; but I think that the covenant is not discharged by the will, for where a gift is to discharge a former debt, something must move from the giver; but, in this case, the whole is to arise out of the wife's estate, and therefore to satisfy the father's covenant, this declaration is entirely void. However, as it was the father's intention to give his daughter only 3,000*l.*, I think that only 2,000*l.* ought to be raised out of the wife's estate, and that the other 1,000*l.* should be raised out of the father's estate.

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Where a gift is to discharge a former debt, something must move from the giver.(1)

By the decree it was declared that one third part of the real estate of Sir *Richard Sandys* belonged to *Priscilla* late the wife of *Henry Sandys*, the elder, and her issue to be conveyed and settled in the manner thereafter mentioned, and that the said *Henry Sandys*, the elder, was not entitled to be tenant thereof by the curtesy of *England*. And it was ordered and decreed that the trustees should convey such third part of the said Sir *Richard Sandys* real estate to *Richard Sandys*, the infant son of the said *Priscilla*, in general tail, with remainder to *Henry Sandys*, his younger brother, in general tail, with remainder over, in default of heirs of the body of the said *Priscilla* according to the will of the said Sir *Richard Sandys*.

The decree also declared the will of *William Roberts* to be well proved and ought to be established except as to the sum of 1,000*l.* thereby appointed to *Elizabeth Mary Roberts* in satisfaction of the like sum due from him to her by covenant, and declared that one third part of the real estates of Sir *Richard Sandys* belonged to *William Roberts* by virtue of the appointment contained in his father's will for such estate as was gained or created by the fine levied by his father and mother, and the declaration of uses thereof subject to the charge of 2,000*l.* part of the sum of 3,000*l.* to be raised for the benefit of *Elizabeth Mary*, his sister and declared that the limitation over of the sum of 2,000*l.* to *Mary Roberts* by the said will was void, and as to the sum of 1,000*l.* residue of the sum of 3,000*l.* mentioned in the will of *William Roberts*, it was declared that the appointment thereof by the said will for satisfaction of a debt due

(1) See *Bellasis v. Uthwatt*, ante page 273.

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from him by covenant contained in his marriage settlement was void; and that *Elisabeth Mary Roberts* was entitled to have satisfaction for the principal sum of 1,000*l.* with interest as a specialty creditor under that covenant, and for that purpose directed accounts of the real and personal estates of *William Roberts*, the father; and in case there should not be assets to pay the said sum of 1,000*l.* and interest his Lordship reserved the consideration as between *Elisabeth Mary Roberts* and her brother *William Roberts*, whether she was entitled to have satisfaction out of her mother's third part of Sir *Richard Sandys* estate, for the residue of the said sum of 1,000*l.* and interest as a gratuitous appointment and whether the conveyance of such third part by the said trustees to the said *William Roberts* ought not to be made subject thereto. (1)

(1) Reg. Lib. B. 1738. fo. 119.

DENNIS DALY and Lady ANN, his Wife Plaintiffs; (1)

and

Sir EDWARD DESBOUVERIE, JOHN
MANLEY and THOMAS WARD, Trus-
tees of Lady CLANRICKARD'S Will, the } Defendants.
Earl of CLANRICKARD, and Others . }

May 1st, June 6th, and December 11th, 1738.

JOHN SMITH, the father of the Countess of *Clanrickard* and 2 Atk. 261.

Lady Desbouverie by a settlement of the 8th of September, 1714, settled certain lands upon himself for life, remainder to trustees in trust for the separate use of *Lady Clanrickard* for life, remainder to such persons, and for such uses and estates as she should appoint and in default of such appointment to her and her heirs.

J. Smith devises a certain real estate to *Lady Clanrickard* for life, with remainder to such persons and for such uses and estates as she should limit and appoint. *Lady Clanrickard* appoints the real estate to her son for life, remainder to his issue, remainder as to a moiety to the plaintiff, her daughter, *Lady Ann* for life, with remainder as to her sons and daughters in tail male, and provides that if *Lady Ann* should marry without the consent of three trustees or the major part of them, that she and her issue should forfeit her and their right to the estate and that the next person in remainder might enter and enjoy the same.

Held that *Lady Clanrickard* might annex to the appointment such condition in restraint of marriage; and that the plaintiff *Daly* being desirous of marrying *Lady Ann*, and having submitted proposals to the trustees for a certain settlement to be made by his father, to the terms of which the trustees having objected; but one of the trustees at the request of the others having written to a friend of the plaintiff *Daly's* father, stating that if the father would make the settlement proposed by the son they should be obliged to consent on account of the young people's affections being engaged; and the plaintiffs having married privately without the knowledge of the trustees before an answer was received to that letter; It was likewise held under the circumstances of the trustees not objecting to the family, fortune, or person of the plaintiff, and upon the father's consenting to make the settlement proposed by the son which was in itself reasonable, that the marriage must be deemed a marriage had with the consent and approbation of the trustees. (2)

The said *John Smith* by his will of the 9th of July, 1718, gave to the plaintiff *Lady Ann* and her sister, daughters of *Lady Clanrickard*, legacies of 1,000*l.* a-piece payable at twenty-one or marriage and gave the residue of his real and personal estate to trustees upon trust as to one moiety for the separate use of *Lady Clanrickard* for life, remainder to such persons and for such uses and estates as she notwith-

(1) The statement of this case is taken from the *Lord Chancellor's Note-book* and *Atkins*; the arguments of counsel from *Lord Hardwicke's Note-book*, and the judgment from a manuscript report.

(2) As to conditions in restraint of marriage, see note (2) to the case of *Hervey v. Aston*, ante, page 351.

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standing her coverture should limit and appoint, and as to the other moiety upon trust for her other daughter with the same powers and the said testator by a codicil to his will directed that in case the plaintiff *Lady Ann* or any of his grand-daughters named in his will should marry in the lifetime of their mother, under the age of twenty-one without the consent of their mother that their legacies were to be divided amongst the rest of his grand-daughters, and the plaintiff *Lady Ann's* brother *John*, and such other children as the plaintiff *Lady Ann's* mother should have.

Lady Clanrickard after the death of her father, and husband, by deed poll of the 1st of August, 1732, appointed the surviving trustee of the settlement of the 8th of September, 1714, to convey the premises therein comprised to Sir *Edward Desbouverie*, *John Manley*, and *Thomas Ward* to the use of her son the Earl of *Clanrickard* for life, remainder to his first and other sons in tail male, remainder to his first and other daughters in tail general, remainder as to one moiety to the use of her daughter, the plaintiff *Lady Ann* for life, remainder to her sons and daughters in tail male, and as to the other moiety to the use of her other daughter *Lady Mary* for life, with the same remainder to her children and with cross remainders between her two daughters; and she thereby declared and provided that if any of them the said Earl of *Clanrickard*, *Lady Ann* and *Lady Mary*, should marry without the consent of the said Sir *Edward Desbouverie*, *John Manley*, and *Thomas Ward*, or the major part of them or of the survivor of them, if any of them should be then living that then he, she or they so marrying without such consent, and his, her or their issue and descendants should forfeit and lose all his, her, or their right to the premises, and that the next person in remainder should and might enter and enjoy the same as if he, she or they was or were dead without issue.

By another deed poll of the same date, *Lady Clanrickard* appointed and directed that the residue of the real and personal estate of her father, should be conveyed to Sir *Edward Desbouverie*, *John Manley*, and *Thomas Ward*, to be by them sold, and that they should lay out the money to be produced by such sale, in the purchase of lands to be settled upon the same uses as mentioned in the preceding deed.

Lady Clanrickard, by her will of the 2nd of August, 1732, confirmed the above appointment, and appointed Sir *Edward Desbouverie*, *John Manley*, and *Thomas Ward*, executors, and

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residuary legatees, upon the like trusts as are before mentioned in the said deed-poll.

After Lady *Clairickard's* death, the trust property was in pursuance of a decree of this Court, conveyed and assigned to the trustees appointed by her.

In the month of April 1735, the plaintiff, Mr. *Daly*, informed Sir *Edward Desbouverie*, one of the trustees, with his desire of marrying Lady *Ann*, and stated to him the heads of the proposed settlement, which the trustees desired him to put into writing, which he accordingly did, and sent them by letter to Sir *Edward Desbouverie*, dated the first of May, and which letter was in the words following:—"The proposals to be sent to Dean *Taylor*, and what my father will come into is, the settling the reversion of 4,000 acres of land, and of the lady's fortune, the maintenance to be 600*l.* a-year, and the jointure to be 500*l.*, and 600*l.* in case of no issue. This I am sure my father will immediately come into."

These proposals *Desbouverie* communicated to *Ward*, who both agreed that it was unreasonable that Lady *Ann's* fortune should be settled upon the father for his life, and they said they would not consent to the marriage, unless the interest of her fortune was to be settled upon her and her intended husband, for their maintenance, in addition to the 600*l. per annum.*

Desbouverie communicated with Lady *Ann* upon the subject, and told her that the trustees would not consent to the match, unless the interest of her own fortune was settled upon her and *Dennis*, for their present maintenance, as well as the 600*l.* a-year; to which Lady *Ann* answered, she always understood it was to be so, and that otherwise she would never agree to the match; but told him there would be no harm in sending the proposal to Dean *Taylor* to inquire into the value of the estate which the plaintiff's father proposed to settle, upon which the defendant *Desbouverie* told her he would desire the other trustees to send them, and desired her always to remember upon what footing they were sent, and declared he would not be concerned in the said proposals, or consent thereto, without her fortune being settled upon her and her husband, for their present maintenance, in addition to the 600*l. per annum.*

Mr. *Manley*, at the request of the other trustees, who were strangers to *Dennis* and his father, transmitted the son's proposals to Dean *Taylor*, who was a friend of the

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family in *Ireland*, and guardian to the Earl of *Clanrickard*, and which he accordingly did in the following letter, dated the 29th of May, 1735.

"We take the liberty to give you some further trouble in relation to *Lady Ann*, who we find has an inclination to marry the son of Mr. *Dennis Daly*. The young gentleman has sent the inclosed proposals to Sir *Edward Desbouverie*; as we are entire strangers to Mr. *Daly*, we desire you will inquire into his circumstances, and how far he is able to make the settlement proposed by his son; and if his father should desire to treat, it is our opinion my lord's counsel should be consulted thereupon. *Lady Ann's* fortune at present is from her grandfather *Smith*, about 3,400*l.*, besides what was left by her father out of his *Irish* estate, which will make the whole, as we compute, upwards of 7,000*l.*, and she has a further expectancy in case of my lord's death, of a moiety of what my *Lady Clanrickard* left my lord, if she marry with our consent, if not, she will lose it; and the whole will go to her sister, unless she should likewise marry without our consent, in which case the whole goes to Sir *Henry Parker*, my lady's son by her first husband. This is all the influence we have over *Lady Ann*, and she might with her fortune marry much better, yet if Mr. *Daly's* father will make the settlement proposed, we believe the young folks are too far engaged for us to attempt to break off the match, and therefore we shall be obliged to consent to it. *Lady Ann* very soon after her father's death, went to her father's relations without our privity or consent, and how far they may have perverted her, we cannot tell, but she and the young gentleman both declare themselves Protestants, and say that is the reason my lady's father's relations are against the match.

We are your most humble servants,

JOHN MANLEY.

London, 29th of May, 1735.

P. S. The above letter was prepared for all the trustees, but Sir *Edward Desbouverie* going out of town in a hurry, desired I would forward it to you."

On the 5th of June, 1735, the plaintiffs were married privately without the knowledge of the trustees.

By a letter dated the 12th of June, 1735, Doctor *Taylor* wrote to Mr. *Manley* a letter in answer to Mr. *Manley's* letter, wherein he inclosed the proposals given him by Mr.

Dennis Daly, the father, which was as follows:—"Four thousand acres to be settled to the use of *Dennis Daly*, sen. for life, to *Dennis Daly*, jun. for life, with remainder to his first and other sons in tail male. The said *Dennis Daly* hath agreed, that he will lay out the portion at interest or in the purchase of land, when had, which should be settled to the same uses, 600*l.* *per annum* present maintenance, 600*l.* *per annum* jointure, if no issue, but if issue 500*l.* *per annum*, this is what was agreed and settled by Sir *Edward Desbouverie*, and a settlement to be made accordingly." In answer to which letter, Sir *Edward Desbouverie* wrote follows:—

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Langford, 25th of June, 1785.

"I saw Mr. *Daly* once or twice at my lodgings in *London*, I came to no manner of agreement with him, but referred every thing till his father's proposals came from *Ireland*. I find them now widely different from what I expected, that I cannot think myself or the other trustees will ever come into them; he demands the income of the Lady *Ann*'s fortune for himself during his life, for which he offers to settle on them 600*l.* *per annum*, present maintenance; he estimates her fortune at 9,000*l.*, which at 8 *per cent.*, the common interest in *Ireland*, produces 540*l.* *per annum*, and he now allows his son 60*l.* *per annum*, so that he really intends at present to part with nothing, and Lady *Ann* will only have during the father's life, the income of her own fortune to maintain herself, and possibly a large family of children. I am ashamed the father should make such a preposterous offer; but, however, if you please to tell him that if he expects my consent in this affair, that I insist Lady *Ann*'s fortune be settled with the 600*l.* *per annum* for present maintenance, and if she survives his son, the said income of her own fortune should be settled as an additional jointure on her, together with 600*l.* or 500*l.* *per annum*, which shall happen, as in his proposals; and if he is not pleased with these terms, I shall concern myself no more about the matter."

Which letter the two other trustees *Manley* and *Ward*, inclosed in the following letter to Dr. *Taylor*, dated the 5th of July.

SIR,

"We received your letter of the 12th of June, last month,

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Sir *Edward* being in the country, we sent it him, and he having fully expressed his own as well as our sentiments in the inclosed letter, we have nothing more to add, only to assure you that we are thoroughly sensible of your care of my lord's affairs: as to Mr. *Daly's* proposal, unless he will consent to settle Lady *Ann's* fortune, and 600*l.* *per annum* for maintenance, and as a jointure in case she survives his son, as proposed by Sir *Edward*, we shall not concern ourselves any further."

The bill prayed that Lady *Ann's* portion might be laid out in the purchase of lands, and that a settlement might be made of the lands so to be purchased, and of the estates proposed to be settled by Mr. *Daly*, according to the proposal and agreement.

The defendants, the trustees, insisted by their answer, that the marriage was had without their consent.

Mr. *Daly*, the father, consented to make the proposed settlement, if it should be held that the marriage was with the consent of the trustees.

The cause first came on upon the 1st of May, 1738, when it was adjourned to the first day of causes in the next term, by reason of the pendency of the cause of *Hervey v. Aston*, for the opinion of the judges, wherein several of the points on the effect of conditions against marrying without consent, were expected to be determined.

It again came on on the 6th of June in the same year, and was again adjourned to the next term, with liberty for the plaintiffs to file a supplemental bill, in order to bring the issue of the plaintiffs before the Court, and was finally heard on the 11th of December, 1738.

Mr. *Chute*, Mr. *Noel*, Mr. *Hoskins*, and Mr. *Murray*, for the plaintiffs, contended, 1st. That Lady *Clanrickard* had no power to impose these conditions upon her children.

2dly, That the restrictions were of such a nature that they ought not to take effect, and

3rdly, That there was sufficient evidence of consent by the trustees, or of what was equivalent to it, to entitle Lady *Ann* to her portion.

As to the first point, it was contended, that Lady *Clanrickard* having only a power of appointment, could not annex this condition, which was not contemplated by the grandfather, from whom the property proceeded. That if the power had been executed in the lifetime of the father, it might have in-

terfered with the proper exercise of parental authority. As to the second, it was contended, that this case differed from that of *Hervey v. Aston*. This being a condition subsequent, and a forfeiture imposed not only upon the person offending, but upon her children. As to the third and principal point, it was contended that there was sufficient evidence of actual consent; that they received the proposal, and approved of it, subject to an alteration which has since been adopted; that they must have approved of the person and family of the plaintiff, before they could direct any inquiries as to his property; that by the course which they adopted, they had permitted the plaintiffs to engage each other's affections, and had given that encouragement to the marriage which was equivalent to actual consent, and the cases of *Mesgrett v. Mesgrett*, 2 Vern. 580. and *Farmer v. Compton*, 1 Ch. Rep. 1. were cited.

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Mr. Attorney-General for Lady Mary Burke, and Mr. Browne and Mr. Fazakerley for Sir Henry Parker, contended, that there was no evidence of the trustees having communicated any sort of consent to either of the plaintiffs; that the letter of the trustees to Doctor Taylor was the only evidence of consent; that at the utmost that letter amounted only to a consent if certain terms were complied with; and that the marriage having taken place before those terms were complied with, was in fact without consent, and that the property therefore immediately went over to the next in remainder, and could not be called back again by any thing done afterwards, and the case of *Fry v. Porter*, 1 Ch. Ca. 138. was cited.

LORD CHANCELLOR.—As to the first point, whether Lady Clanrickard could clog the appointment made by her with such conditions as in the present case, I am of opinion that she could. Mr. Smith enabled her to appoint the lands to such uses, and to such persons, and for such estates as she thought proper, and I have no doubt but that, under so large a power, she might subject them to such terms and conditions as she pleased, but although she had such a power, I can by no means think that she has executed it reasonably. Mr. Smith, from whom the whole proceeded, had set her a pattern of a much more proper restraint, which was from marriage before twenty-one without consent, but she has carried that restraint to the end of their lives, and in case of disobedience in the parents, has created a forfeiture in the children, though they claim in their own right as purchasers,

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and not by descent from their parents, nay, though they should marry a second time with consent, there is no room for repentance, but the penalty extends to all the issue of such second marriage. Therefore, although a Court of Equity will never encourage children to oppose their parents, yet in such hard cases, they ought to be as liberal and favourable as possible in construing the execution of such extraordinary powers; they accordingly have always regarded the substance and end of such powers, and have looked to the main point only, namely, whether there be any evidence of consent by the trustees. To find this out, we must see whether there was any objection to the person, family, or fortune of the gentleman, and I see none in the present case. There is no appearance of any disparagement to the lady, and under these circumstances, it is probable that the trustees would be inclined to consent, nay, if they found the lady inclined to the match, it was their duty to consent, and this Court would not suffer them obstinately to refuse their consent. Trustees for this purpose are put in the place of parents, and ought to act as parents, whose duty it is not to oppose the happiness of their children.

Under the circumstances of this case, I think that there is evidence that the trustees approved the match, and gave their consent. The letter to Doctor *Taylor* shews, that they were privy to the lady's affection for the plaintiff, and that the plaintiff had delivered proposals to them, but that they being ignorant of his father's affairs, were desirous of ascertaining whether he was of ability to complete the settlement proposed; if he was, no objection seemed to remain to the match; the settlement was the only thing about which there seemed to be any scruple; if that was made good, I cannot see that they disliked either the plaintiff's family or person, or any thing else. It is objected that the letter does not impart any actual consent, but only states reasons upon which they might be induced afterwards to consent, and that too with force, saying they shall, they fear, be obliged to consent, but I think it plainly appears that they referred every thing to the settlement, and that they in fact did consent, in case that was perfected.

As to the expression of their being obliged to consent, what could oblige them? no external force, but only the reasonableness and fitness of the thing; and if upon such a proposal of marriage they had refused their consent, I should have thought them guilty of a breach of their trust. It is

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objected that Mr. *Daly*, the father, was under no obligation previous to the marriage, to confirm the proposals, but that proves nothing; for when the settlement is made, it will have relation to the original proposals, and will be as much for their benefit as if it had been actually sealed before the marriage; the performance of the condition will refer to, and must be connected with the previous consent, and I am satisfied that the trustees did consent, provided the father would carry the proposals into effect. In all these cases the Court has proceeded upon very liberal grounds, and has put a construction most favourable to prevent a forfeiture, and has only inquired whether there was reasonable evidence of consent as in the cases of *Mesgrett v. Mesgrett*, 2 Vern. 580. *Farmer v. Compton*, 1 Ch. Rep. 1., and *Bostock v. Ireton*, Reports of Cases in Lord Nottingham's time, Mich. 1675, reported in 2 Ch. Rep. 13, under the names of *Wiseman v. Foster*.

His Lordship declared that the plaintiff's marriage ought, upon the circumstances of this case, to be deemed a marriage with the approbation and consent of the trustees, and that the defendant *Daly* ought to make a settlement according to the proposal, and he directed the trustees should carry into effect the directions and trusts contained in the deeds Poll, except as to the proviso obliging the Lady *Ann* to marry with the consent of the trustees, such marriage having been already had. And his lordship referred it to the Master to enquire what the portion of Lady *Ann* was, which moved from her father, together with the money legacy to which she was entitled under her grandfather's will, and directed the same to be laid out in land to be settled to the same uses as the 4,000*l.* money, and in making the settlement, provision is to be made for younger children, and the Master was to take an account of the interest of Lady *Ann*'s portion of the legacy she is entitled unto under her grandfather's will since her marriage, and how it has been applied, and that so much as remains unreceived be paid over to the defendant *Dennis Daly*, and thereupon the defendant, *Dennis Daly* is to pay what shall appear due to the plaintiff for the 600*l.* a-year agreed to be settled for the maintenance of himself and his family, deducting what the plaintiff *Dennis Daly* has received for the interest of the Lady *Ann*'s portion and legacy, and what the defendant *Dennis Daly* has paid on account thereof. (1)

LUCAS and OTHERS, *contra* SEALE. (1)*Appeal from the Rolls..**December 12th, 1738.*

Executors cannot bring a bill to compel their co-executor to pay to them money due from him to the estate of their testatrix, unless under special circumstances.

THE defendant borrows of *Elizabeth Gee* 500*l.*, and for securing payment of the same in 1728, mortgages his estate in fee to *Elizabeth Gee*, and gives her a bond.

Elizabeth Gee by her will dated the 25th of July 1732, devises the mortgaged estate to the plaintiffs and defendant, and makes them executors of her will.

The plaintiffs bring their bill to compel the defendant to redeem; and in case the mortgaged premises were not of sufficient value, that the defendant might make up the deficiency.

The *Master of the Rolls* referred it to the Master to see what was due for principal and interest on the mortgage, and to tax the costs, and upon payment of the same, the plaintiffs were to re-convey; but in default of payment defendant was to be foreclosed, and the mortgaged premises were to be sold; and if the money arising from the sale was insufficient for payment of principal, interest and costs, defendant was to pay the deficiency.

From this decree the defendant appealed.

Mr. *Browne* for the plaintiffs.

Defendant being a joint devisee, plaintiffs could not bring an ejectment against him; neither could they bring any action on the bond for the payment of the money.

Mr. *Attorney-General* for the defendant, insisted, that the plaintiffs ought not to have the money out of the defendant's hands, who was a co-trustee. The Court never does that unless there is proof of his being insolvent, and that they should have brought a bill to have the money secured, and applied according to the will.

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LORD CHANCELLOR said, this decree has gone too far; when a person is co-executor and debtor, the money is assets

(1) This case is taken from a Manuscript Report of Mr. *Forrester*, which agrees with the same case in Lord *Hardwicke's* Note-book.

in his hands ; and therefore unless there is something special in the case, they cannot bring a bill to compel him to pay the money to them ; but the proper bill had been to have an account, and it should have been brought by those entitled under the will.

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But there is no ground to compel him to pay the assets over to another executor, because he has an equal right ; and if there is likely to be a loss, the Court itself would take care of the assets.

In this case he is mortgagor and devisee under the will of the estate itself, therefore this estate at law can never be recovered from him wholly.

It may therefore be reasonable that he should assign his right as devisee to the other executors.

But I will not direct that, before it has been enquired into whether this mortgage be a good security, and therefore reversed the decree, and directed that inquiry, and reserved all further directions. (2)

(2) Reg. Lib. B. 1737, fol. 90.

HALHED v. MASON. (1)

(This cause came on by Appeal from the Rolls.)

December 12th, 1738.

By marriage settlement of the 24th of January 1718, previous to the marriage between *Nathaniel Halhed* and *Elizabeth Mason* being at the time of her marriage in treaty for an estate, it was agreed by marriage settlement, that if the purchase could be obtained, that the purchase money should be paid out of her fortune, and the estate when purchased should be settled upon the husband and wife, and the issue of the marriage ; but if the purchase could not be obtained, then the husband covenanted that he would lay out 500l. part of *Elizabeth's* fortune in the purchase of other lands, to be settled to the same uses. Upon the marriage settlement which was executed in the usual manner, an indorsement was made before the sealing and delivery of the deed, by which it was declared by all parties, that if the particular purchase could not be effected, that then the husband should not be obliged to lay out the sum of 500l., or any other sum in the purchase of any other estate. The indorsement was not signed by the parties, but the attestation of the witnesses was annexed to it. Held that the indorsement, though neither signed nor sealed by the parties, but only attested was part of the deed having been made before the sealing and delivery of the deed.

(1) The statement of this case, the arguments of counsel, and the enquiry directed, are taken from Lord *Hardwicke's* Note-book, the judgment from a Manuscript Report.

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beth Mason, after reciting that *Elizabeth Mason* was then in treaty for the purchase of certain lands belonging to Mr. *Broome*, computed to be of the value of 500*l.*, it was agreed, that if the purchase could be obtained, that the 500*l.* should be paid for out of the fortune of *Elizabeth Mason*, and that the lands when purchased should be settled upon the husband for life, remainder to the wife for life, and from and after their deaths, to the use of such children, in such shares, and for such estates as the husband and wife should jointly appoint; and in default of such appointment, to such children as the survivor should appoint, and in default of such appointment, to the use of all the children living at the death of the survivor equally as tenants in common, and the heirs of their several and respective bodies with cross remainders between them, remainder to such persons as the wife should appoint; and in default of such appointment, to the heirs of the husband. But if the said purchase could not be obtained, then the said *Nathaniel Halhed* covenanted with the trustees that he would, within two years after the said intended marriage, lay out 500*l.* of the estate in money of the said *Elizabeth* in the purchase of some estate of inheritance as near the settled estate as might be, and cause the same to be settled to the like uses as the estate of *Broome* if purchased, would have been settled; and it was thereby declared, that the provision thereby made for the issue of the marriage should not bar them from claiming by the custom of the city of *London* any part of his personal estate.

This deed was executed in the usual manner, but upon it was indorsed the following indorsement:—"Memorandum, that before the sealing or executing the within indenture, it was agreed and declared by and between all the parties thereunto to be their true meaning, that in case the purchase of the estate at *Broome* therein mentioned can be obtained, that then the purchase money for the same shall be raised and paid out of the personal estate or fortune which the within named *Nathaniel Halhed* will be entitled to by the marriage with the within named *Elizabeth Mason*; but if the said purchase cannot be had or obtained, then the said *Nathaniel Halhed* or his heirs shall not be obliged to lay out the sum of 500*l.* or any other sum in the purchase of any other estate, or make any other settlement whatsoever, any thing in the said indenture to the contrary notwithstanding."

This indorsement was not signed by the parties, but the attestation of the witnesses was annexed to it.

Nathaniel Halked by his will, bearing date February 5th, 1728, gave 2,000*l.* to his son *William Halked*, to be paid at twenty-one, and 1,000*l.* a-piece to his two daughters, to be paid upon the attaining twenty-one or marriage; but if they died before either of those events, their legacies were to cease for the benefit of his executors; and he charged certain messuages with the payment of the 2,000*l.*, and all the residue of his estate, real and personal, he gave to *Nathaniel Halked*, his eldest son by a former wife, and made him sole executor.

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The purchase of the lands called *Broome* was not completed, and no other lands having been purchased with the sum of 500*l.*, this bill was filed for the purpose of having the 500*l.* laid out in the purchase of lands according to the marriage articles.

For the plaintiffs it was contended, by Mr. *Attorney-General*, that the indorsement upon the marriage articles was void, being in contradiction to the deed itself, and not being signed by the parties; and that it did not appear that the estate called *Broome* could not have been obtained; that the legacies given by the will of the husband could not be taken in satisfaction of the agreement to lay out the 500*l.*, for that there was no instance of a money legacy being held to be a satisfaction for land, and that the children were to have different interests in the lands to be purchased, and the legacies.

Mr. *Fazakerley* for the defendants insisted, that the indorsement having been made previous to the execution of the deed, was to be taken as part of it, as much as the condition of a bond was part of the deed, and that it was perfectly immaterial where the seal was placed; that from the acts of the parties it was to be presumed that the lands called *Broome* could not be purchased, or at least that some inquiry ought to be directed upon that head; that the father had by his will made a disposition of his whole estate; and that the legacies must either be taken in satisfaction of the agreement, or if not, that the plaintiffs ought not to be permitted to take under the will, and at the same time to insist upon the execution of the articles, and thereby defeat the will.

The *Lord Chancellor* expressed his opinion, that the indorsement, though neither signed nor sealed by the parties, but only attested, was nevertheless part of the deed, having been made before the delivery, and that the sealing and delivery of the deed went to the indorsement likewise.

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Upon the other point his Lordship cited the case of *Saville v. Saville*, Sel. Cas. in Ch. 32. and 2 Atk. 458, S. C. and directed an inquiry, whether any, and what endeavours had been used by the testator, or by *Elizabeth* his wife, or either of them, to complete the purchase of the said estate of the said *Broome*, and whether the same could have been obtained, and what was the reason that the purchase had not been completed; and whether the same could then be obtained, and upon what terms; and directed the Master to state the same, and all the circumstances to the Court, and his Lordship reserved the consideration, whether any, and what sum of money ought to be laid out in the purchase of lands, according to the marriage agreement, and touching the interest thereof, until after the Master should have made his report.(1)

(1) His Lordship reversed the decree of the *Master of the Rolls*, so far as it directed that the said 500*l.* should be laid out in the purchase of land, to be settled to the uses of the marriage

settlement of the 24th of January, 1718; and so far as it directed interest to be given on the said sum of 500*l.* since the testator's death. Reg. Lib. A. 1738. fol. 155.

GREEN v. SMITH.

MOORE GREEN, an Infant Plaintiff; (1)
and
ELIZABETH, HANNAH, and BRIDGET } Defendants;
SMITH, and Others }

AND

ELIZABETH, HANNAH, and BRIDGET } Plaintiffs;
SMITH }
and
MOORE GREEN and Others Defendants.

December 15th, 1738.

JOHN SMITH by his will, bearing date the 19th of December, 1722, devised his real estates to trustees, upon certain trusts therein mentioned, and after performance thereof, and subject to certain charges, upon trust that they should, when his kinsman, the plaintiff, *Moore Green*, should attain twenty-four years of age, convey to him the said estates for his life, with remainder to his first and other sons successively in tail male, with provision in the mean time for maintenance, remainder over in default of issue of the plaintiff; and directed that the residue of his personal estate should be laid out in the purchase of lands, to be settled to the same uses as his real estate.

1 Atk. 572.
Where a testator by his will directs his personal estate to be laid out in land, to be settled upon certain trusts, and subsequent to the date of his will contracts for the purchase of an estate, but dies before it is completed, the Court will not decide where

there is a doubtful title, between the heir at law of the testator and the devisees, whether the contract ought to be carried into effect, without having the vendor a party to the suits.

The original bill prayed the execution of the trusts of the testator's will.

By the cross bill, the heirs at law of the testator claimed all such lands as had been purchased or contracted for since the execution of the will, and all such copyhold premises as had not been surrendered to the use of the will, and prayed that the trustees might complete the unfinished purchases out of the personal estate, for the benefit of the heirs at law.

(1) The statement of this case is taken from the proceedings in the cause; the rule said to be laid down by Lord *Hardwicke*, from *Atkyns*, and the memoranda from Lord *Hardwicke's* notes.

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By the decree made by the then *Lord Chancellor*, on the 26th of February, 1730, it was, amongst other things, declared, that as to the copyhold lands and hereditaments not surrendered to the use of the will, and as to the freehold lands purchased or contracted for, after the making of the will, that the same belonged to the heirs at law; and that if any part of the purchase money remained unsatisfied, the same was to be paid out of the testator's assets, and that the conveyances of such of the said lands and hereditaments as were not then made, were to be made to the heirs at law.

The Master, by his report, bearing date the 24th of July, 1738, made in pursuance of an order of the 21st of July, 1735, to state the circumstances particularly to the Court, certified that the testator *John Smith*, in the year 1728, agreed with *John Havard* for the purchase of certain freehold and copyhold premises at the sum of 368*l.* and died soon afterwards: that *John Havard*, after the testator's death, offered to the executors either to abandon the agreement, or to complete the purchase before a certain day. That the executors in answer, stated to him the necessity of applying to the Court for directions.

The Master also certified, that upon the marriage of *John Havard*, it was agreed that the freehold part of the premises in question, should be settled upon the husband for life, remainder to the wife for life, remainder subject to a term of five hundred years to their first and other sons in tail, remainder to the heirs of their bodies generally, remainder to the right heirs of the husband, and that it was agreed that the copyhold premises should be settled to the same uses, except as to the term of five hundred years, and that it was further agreed that a power should be reserved to the husband and wife jointly, with the consent of the trustees, or the personal representative of the survivor, in case a good price should be offered for the said premises to the good liking and satisfaction of the said trustees, or the survivor of them, or the executors or administrators of such survivor, to revoke the uses before limited, as to all or any part of the premises, and to sell the same, so as the purchase money was invested in the purchase of other lands, to be settled upon the same uses. The report further stated, that at the time of making the above articles, the premises in question were subject to a mortgage of 240*l.*, which it was agreed should be paid off out of the wife's portion; but it was not in fact paid off until after the death of the testator, *John Smith*; namely,

until the month of September 1729. That at the time of making the contract of sale, all the trustees of the settlement were dead, and that the wife of *John Havard*, the vendor, was the personal representative of the survivor, and consented to the sale, and would have joined her husband in carrying it into effect, and that she died after the testator; namely, on the 30th of January, 1733, leaving two infant children.

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These causes came on to be heard on the special matter in the first report.

John Havard, the vendor, was not made a party to these suits.

The LORD CHANCELLOR in this cause, is stated by Mr. *Atkyns*, to have laid down the following rules;

"That agreements to be performed, are often considered as performed; for if a man *covenants* to lay out a sum of money in the purchase of lands, generally, and devises his real estate before he has made such purchase, the money *agreed* to be laid out will pass to the devisee." (1)

"That where a man having made his will, afterwards enters into a contract for the purchase of land, the lands contracted for will not pass by the will, but descend to the heir at law." (2)

Where a person contracts for a purchase of lands after a will made, they will not pass thereby, but descend to the heir at law.

"That if a man gives a portion to his daughter by a will, and afterwards advances her with the like sum, it shall go in ademption of the legacy." (3)

"That where an ancestor, after the making of a will, agrees for the purchase of particular lands, the heir at law would have a right to them, provided a good title can be made, otherwise if it cannot; but it is going too far to say that though the heir at law cannot have the land, yet he shall have the money so intended to be laid out."

Where after making a will, a person agrees for the purchase of particular lands, if a good title cannot be made, as the heir at law

cannot have the land, he shall not have the money intended to be laid out.

"That the *vendor* of the estate is, from the time of his con-

(1) So *Milner v. Mills*, Mos. 123. *Greenhill v. Greenhill*, Pre. in Ch. 320. *Lingen v. Sowray*, 1 P. Wms. 172. S. C. cited 3 P. Wms. 221. *Potter v. Potter*, 1 Ves. 438. *Beauclerk v. Mead*, 2 Atk. 168. *Oldham v. Hughes*, ib. 452. *Whittaker v. Whittaker*, 4 Bro. C. C. 31. *Guidot v. Guidot*, 3 Atk. 254. *Broome v. Monck*, 10 Ves. 611. *Rose*

v. Cunningham, 11 Ves. 554.

(2) So *Langford v. Pitt*, 2 P. Wms 629. *Allen v. Allen*, Mos. 262. *Capel v. Girdler*, 9 Ves. 509., and see *Broome v. Monck*, 10 Ves. 597. *Gaskarth v. Lord Lowther*, 12 Ves. 107.

(3) See *Bellasis v. Uthwatt*, ante, p. 273.

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tract, considered as a trustee for the purchaser, and *the vendee*, as to the money, a trustee for the vendor." (4).

"That in bills for specific performance, this Court never gives relief where the act is impossible to be done, but leaves the party to his remedy at law."

"That where an ancestor has agreed for the purchase of particular lands, but dies before it is quite completed, if the heir at law brings his bill against the devisees, who claim the real estate of the ancestor by a will made before the purchase of those particular lands, the vendor of these lands, where he has a doubtful title, must be made a defendant to the suit, otherwise, if his title be clear."

In the *Lord Chancellor's* notes are the following *memoranda* :—

The questions are,

1st. Whether a good title can be made since the death of the wife.

2nd. If not whether the heir at law is not entitled to the money, agreed to be laid out, in lieu of the land, as being money covenanted by the testator to be laid out in lands.

3rd. Whether this question can in strictness be determined in this cause.

Upon consideration of the Master's Report I am of opinion that there is no ground for the Court to give any directions in this cause touching the performance of the agreement with *John Havard*, or the payment of the purchase-money therein mentioned. (5)

(4) So *Chapman v. Tanner*, 1 Vern. *Walker v. Preswick*, D. 2 Ves. 622.
267. *Pollexfen v. Moore*, 3 Atk. 273. (5) Reg. Lib. A. 1738. fo. 265.

DANIEL ROBERDEAU, an Infant by his }
 next friend } Plaintiff; (1)
 and
 JOHN ROUS and his Wife Defendants.

December 16th, 1738.

THE bill was brought for the delivery of the possession of a moiety of lands in *St. Christopher's*, and likewise for an account of the rents and profits.
 into possession of lands at *St. Christopher's*, and a demurrer will lie to a bill for delivery of possession of lands there.

1 Atk. 544.
 This court has no jurisdiction to put a person brought here,

The defendants demurred to the first part, for that this Court has no jurisdiction over lands at *St. Christopher's*, and likewise to the account prayed of the rents and profits, for that the plaintiff hath not set forth a clear title to them.

LORD CHANCELLOR: As to the first part of the demurrer, I apprehend it is very right, because this Court has no jurisdiction so as to put persons into possession, in a place, where they have their own methods on such occasions, to which the party may have recourse; the present bill, therefore, is carrying the jurisdiction of this Court further than ever was before. Vide the case of *Angus v. Angus*, 1736. (2)

Lands in the plantations are no more under the jurisdiction of this court, than lands in *Scotland*, for it only *agit in personam*.
 this Court than lands in *Scotland*.

The next question is, whether an account of rents and profits ought to be demanded before the plaintiff has established his right at law?

No impediment is shewn to prevent the plaintiff from bringing his ejectment, for he claims a moiety as tenant in common.

As to the general equity, an infant here in *England* may bring a bill for an account of rents and profits against a person who keeps possession, after the death of the infant's ancestor.

An infant may bring a bill for an account of the infant's

(1) This case is taken from *Atkyns*; Note-book.
 it does not appear in Lord *Hardwicke's* (2) See *ante*, page 23.

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Demurring
for want of
jurisdiction is
informal and
improper; a
defendant
should plead to
the jurisdic-
tion. (2)

Plantations
originally
members of
England, and
subject to the
laws thereof,
unless in some
customs,
which they
have a power
of making.

son who keeps possession after the death of the infant's ancestor; and as the demurrer is only to the bill, I must take it for granted, he is resiant here in *England*.

The defendant should not have demurred for want of jurisdiction, for a demurrer is always in bar, and goes to the merits of the case; and therefore, it is informal and improper in that respect, for he should have pleaded to the jurisdiction.

The delivery of possession may be enforced in person, which was the old way; but the writ of assistance to put persons in possession, as by way of injunction, is of more modern date. (3)

Plantations were originally members of *England*, and governed by the laws of *England*; and persons went out originally subject to the laws of *England*, unless in some regulations and customs, which they have a power of making.

There have been instances of plantation estates being sold in this Court, and consequently this Court must have a power of enforcing a decree for a sale upon the person ordered to convey.

His Lordship mentioned the case of the widow in *Pennsylvania* and *Hamilton*, where there was an order upon *Hamilton* to deliver possession.

His Lordship held the demurrer to be insufficient; and therefore ordered the same to be over-ruled. (4)

(2) This, however, can only be considered as referring to cases where circumstances may give the Court of Chancery jurisdiction, and not to cases where no circumstances can have that effect, per Lord *Redesdale*, Mitford's Plead-

ings, p. 123. and see *Hill v. Reardon*, 2 S. & S. 439.

(3) See *Stribble v. Hawkie*, 3 Atk. 275.

(4) Reg. Lib. B. 1738. fo. 51.

AMBROSE *v.* BROOKS. (1)

December 16th, 1738.

By a rule of the Court of King's Bench it was referred to three of the jury to ascertain what was due to the plaintiff. They accordingly by an award under their hands and seals, awarded that a sum of money was due to the plaintiff, and should be paid to him by the defendant.

An award under the hands and seals of arbitrators is not within the statute of limitations.

The defendant having died the plaintiff filed a bill against his personal representative for satisfaction out of his effects.

To this bill the personal representatives of the defendant pleaded the statute of limitations, 2 James I.

Mr. *Fazakerley*, in support of the plea, contended that as there was no submission by deed there was no specialty; but only a simple contract debt; the rule of Court not amounting to a specialty.

For the plaintiff the case of *Hodsdon v. Harridge*, 2 Saund. 65, was cited to shew that the statute of Limitations was not pleadable to an action of debt on an award made under the hands and seals of arbitrators.

Lord Chancellor's note.—I overruled the plea on the authority of the case above cited; and thought this stronger than the former by reason of the reference being by rule of court.

(1) This case is taken from Lord *Hardwicke's* Note-book.

CRESWICK *v.* CRESWICK. (1)

January 12th, 1738.

1 Atk. 291.
Where a defendant in a cross-bill, but plaintiff in the original, is in contempt for not putting in an answer, the proper motion is to enlarge publication in the original to a fortnight after the answer is come in to the cross-bill.

It was in this case laid down by the *Lord Chancellor* as a general rule, that where the defendant in a cross-bill, who is plaintiff in the original bill, is in contempt for not putting in an answer to the cross-bill, it is irregular to move to stay proceedings in the original cause, till such answer comes in; but the plaintiff in the cross-bill may have publication in the original enlarged to a fortnight after the answer to his bill is come in. (2)

(1) This case is taken from *Atkyns*; page 181. *Aylet v. Easy*, 2 Ves. 336. it does not appear in Lord *Hardwicke's* Note-book. *Dalton v. Carr*, 16 Ves. 93. *Cook v. Broomhead*, ib. 133.

(2) *Ramkissenseat v. Barker*, ante,

WOODCOCK *v.* KING. (1)

January 23rd, 1738.

1 Atk. 286.
Where a bill is for a discovery merely, you cannot move to dismiss it for want of prosecution, but pray an order only on the plaintiff to pay defendant the costs of the suit to be taxed.

It was in this case laid down by the *Lord Chancellor* as a general rule, that where a bill is brought for a discovery merely, and prays no relief, you cannot move to dismiss it for want of prosecution, but can only pray an order upon the plaintiff to pay to the defendant the costs of suit to be taxed by a master.

(1) This case is taken from *Atkyns*; it does not appear in Lord *Hardwicke's* Note-book.

RICHARDS, *Ex parte*. (1)

December 19th, and January 24th, 1738.

THIS was a petition that an infant feme covert might assign a mortgage in fee, pursuant to the act of 7th Anne.

The Master by his Report made upon a reference by the Master of the Rolls certified that she was an infant mortgagee within the true intent and meaning of the act.

Mr. *Fazakerley* in support of the petition contended that this was a case equally within the mischief and inconvenience which the act was intended to remedy as any other; and that the construction of the act ought therefore to be extended to include it. That though in this case it was necessary that a fine should be levied yet that the act enabled an infant to levy a fine if necessary; that if the legal estate of a mortgagee in fee had become entailed some method would be found to bar the entail.

The LORD CHANCELLOR, observed that the disability to levy a fine did not arise from the coverture; but from the infancy which the act had supplied, and delivered his opinion that an infant feme covert was enabled to convey by fine within the meaning of the act, and ordered her to convey and assure accordingly.

The decree is, "His Lordship doth on payment of principal and interest, due on the mortgage to the mortgagees, order that *Elizabeth Price*, the infant, do pursuant to the said Act of Parliament convey and assure the said mortgaged premises according to the said Report and by consent of Mr. *Nicholas Price* the said husband of the said infant he is to join with his said wife in such conveyance and assurance. (3)

An infant feme covert is enabled to convey by fine within the meaning of the 7th of Ann. c. 19. (2).

(1) This case is taken from Lord *Hardwicke's* Note-book.

(2) See likewise *Ex parte Maire*, 3 Atk. 478. The 7th of Ann. c. 19. has

been repealed; but its provisions have been re-enacted and extended by the 6th Geo. 4. c. 74.

(3) Reg. Lib. B. 1738. fo. 151.

PROCTOR v. HARRIS. (1)

January 26th and 29th, 1738.

George Proctor by his will leaves

GEORGE PROCTOR, the plaintiff's father, on the 28th of March, 1735, makes the following will :—

to his son and his lawful issue all his personal property, and appoints guardians of his son, who are to dispose of his education, pocket-money, and allowances, until his age of twenty-five; and who during that time are to receive the property, and are empowered to purchase land or stock as they shall judge proper, with the money he leaves behind for the use of his son; but in case his son should die without lawful issue then all the right invested in his son he bequeaths to his nephew and his issue, with power for his son to jointure his wife with one third of his fortune; by a codicil he confines him to live on the interest only of the money, or stock, or land, which he leaves him, and directs that he shall not meddle with or lessen the principal during the whole of his life, unless for purchasing a place as far as 300*l*.; and he allows him to jointure his wife with the whole or any part of the interest of the money; and if he has children, if boys he may advance them 200*l*. each at the age of twelve years; and if girls what portions he pleases at the age of fifteen; and if he dies and leaves any lawful issue he empowers him to leave the remainder of his fortune, amongst them, in what manner he pleases; but if he has no issue then he leaves it over to his nephew and his issue; by a second codicil he leaves his son under perpetual pupillage during the life of any of his guardians;

Held that the son was entitled only to the benefit of the testator's personal estate for his life, with limitations over to such issue as he shall leave at the time of his death, and in failure thereof to the testator's nephews in such manner as is directed by the will and codicil.

" I leave to my son *Thomas Proctor* whatever before was my property, all my money, goods, wages, prize-money, land, or whatsoever else, under what denomination soever, I leave entirely to my son, *Thomas Proctor*, and his lawful issue; and in case it shall please God to take me hence, before my son *Thomas* arrives to the age of twenty-five years, then I depute my nephew, Mr. *James Upton*, and my brother in law Mr. *Walter Harris*, his guardians, and in failure of either of them, then my nephew Mr. *Charles Upton* to succeed in guardianship, and appoint them disposers of his education, allowances, and pocket-money, until he arrives at the age of twenty-five, and during that time to transact for him, demand and sue in his name, and receive the property and empower the guardians to purchase land or stock as they shall judge proper with the money I leave behind for the use of my son; and in case my son should die without lawful issue, then all the right invested in my son, I bequeath to my nephew and his issue, except only what

(1) This case is taken from Lord *Hardwicke's* Note-book.

jointure my son, if married may settle upon his wife, which I confine to one third of his fortune; and I give 100*l.* legacy to Mr. *Walter Harris*, and 100*l.* more to his nephew Mr. *Charles Harris*."

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On the 2nd April, 1735, the testator made the following codicil:—

"Upon further consideration that my son has not been brought up to any trade, which would require ready money for setting up and carrying on of trade; and therefore think it necessary to confine him to live on the interest only of the money, or stock, or land, that I leave him; and this I will and direct for the preventing of extravagancies of any kind, and their evil consequences which may leave him to want, and without a refuge to fly to; and therefore I direct that he shall not meddle with or lessen the principal sum during his whole life, unless for reasons hereafter mentioned; for purchasing a place as far as 300*l.* will go and no further; I allow him to settle the whole or any part of the interest he pleases of the money I leave him to jointure his wife during her life, and if he has children, when they come to the age of twelve years if boys, 200*l.* each, to put them out apprentices, or any other way he thinks proper; if girls and arrive to the age of fifteen years, what portion he pleases if any are inclined, at that age, to marry; and when he dies if he leaves any lawful issue behind him, he has full power to leave the remainder of his fortune to his lawful issue in what manner he pleases as much as if the money or fortune had been got by his own industry; but if he has no lawful issue then the remainder of the money I left him to go to my nephew Mr. *James Upton*, and his issue, and in failure of them to my nephew Mr. *Charles Upton*, and let every thing else be complied with as mentioned in my will."

He afterwards made a second codicil in the following words:

"I leave my son, *Thomas Proctor*, under perpetual pupillage, and his guardians mentioned as aforesaid, as perpetual guardians, and for seeing the matters above executed of the 2nd of April, 1735; what I mean by perpetual pupillage is during the life of any of the guardians as aforesaid."

Thomas Proctor brought his bill against *Walter Harris*, (who had taken out administration to the testator's estate) for an account of his father's personal estate, and against

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James and Charles Upton, insisting that when he should arrive at the age of twenty-one or twenty-five, that he had a right to have the whole of his father's personal estate paid over to him.

The *Attorney-General*, and Mr. *Chute*, for the plaintiff.

There is a power in the will for the trustees to purchase land or stock as they shall think fit. The trustees ought to do what is most for the plaintiff's benefit; and if it was laid out in land, he would be tenant in tail, and then the money ought to be paid to him. There is likewise a power for the plaintiff to distribute amongst his own issue the money as if it had been of his own getting, and there is a power to give such portions amongst his daughters as he pleases.

Mr. *Fazakerley* and Mr. *Floyer*, for the defendants the *Uptons*.

The testator's intention is clear that this limitation over should take effect, and any reasonable construction must be made, whereby that may be effected. As to the perpetual pupillage, guardianship includes two powers; one over the person, the other over the estate; over his person it cannot have effect beyond twenty-one. But the testator had an absolute power over his estate. He empowers his son to make a jointure, and confines him to live upon the interest only of the money, stock, or land, he leaves him, but not to meddle with or lessen the principal sum during his whole life unless for the reasons mentioned in his will; by which he restrains him to an estate for life with a power to dispose if he has children. By the word issue he means children. But if he has no children then he leaves it over to his nephew.

The *Attorney-General*, in reply.

1st. Consider this as mere personal estate.

2nd. As intended to be laid out in lands.

1st. Upon the will the word issue is a word of limitation only.

2nd. How is this altered by the codicil.

There is no alteration of the estate given; there is only an intention of restraining him from aliening it: this is a void condition, and like a restraint of alienation on an estate in fee-simple. The restriction that he shall not lessen it during his life implies that he might do it, to take effect after his death.

2nd. As to the power to lay it out in land :
If it is laid out in land it must be in tail.

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His Lordship declared, that the plaintiff is entitled only to the benefit of the testator's personal estate for his life with limitations over to such issue as he shall leave at the time of his death, and in failure thereof to defendants, *James and Charles Upton*, according to the will and codicils subject to such powers as are given to the plaintiff by the said will and codicils ; and decreed an account with directions agreeable to this declaration. (2)

(2) Reg. Lib. B. 1738. fo. 186.

GUNSTON v. DARE. (1)

JOHN GUNSTON and other Trustees, for the Conservation of the River }
TONE, in the County of SOMERSET } Exceptants. (1)

and

JAMES DARE, on behalf of himself }
and Others, Inhabitants of TAUN- } Respondent.
TON }

February, 6th and 7th, 1738.

This case came before the Court upon exceptions to a decree of the Commissioners of Charitable Uses. By the 10th and 11th of Wm. 3. c. 8.

certain tolls were imposed upon vessels navigating the river *Tone*, the surplus of which after purchasing the interest in the navigation and in making and keeping the river navigable, was to be applied by the conservators for the benefit of the children of certain parishes in the act mentioned ; and the account of the receipts and disbursements of the conservators were every one to be brought before the bishop of *Bath and Wells*, and the justices for the county of *Somerset*, or any five or more of them who were to examine and allow the accounts, at the next general Quarter Sessions to be held after the 24th day of June ;

The justices having examined and allowed the accounts the bishop not having been proved to be present, and the commissioners of charitable uses having taken upon themselves to examine the accounts ; it was held that the Commissioners of Charitable Uses had no authority to examine the same, but that the bishop and the parties had a summary jurisdiction to examine and pass the accounts.

(1) This case is taken from Lord *Hardwicke's* Note-book.

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By an act of the 10th and 11th of W. 3. c. 8. for making and keeping the river *Tone* navigable from *Bridgewater* to *Taunton*, in the county of *Somerset*, and appointing certain persons conservators; certain tolls are imposed which are directed to be applied in reimbursing to the conservators the principal and interest which they may disburse in purchasing the interest of the heirs of *John Mallett* in the navigation, and in making and keeping the river navigable, and the surplus is directed to be applied for the benefit of the poor of *Taunton*, *Saint Mary Magdalen*, and *Taunton St. John's*, by the conservators, who are empowered and authorised to lay out and dispose of the same in building one or more hospital or hospitals, or otherwise from time to time according to their best discretions for the better educating and maintaining such poor children as are or shall become chargeable to the town and parishes aforesaid, and it was provided that an account of all expenses, costs, and charges, disbursed and of all monies received by them should be kept and entered in a book or books, and that every year such books, and accounts, and vouchers should be brought before the bishop of *Bath and Wells*, and the justices of the peace for the county of *Somerset*, or any five or more of them within the town of *Taunton*, or ten miles thereof, stated, corrected, and allowed, and which accounts were to be made up every 24th of June, and to be stated, examined, corrected, and allowed, at the next general Quarter Sessions to be held after the said 24th day of June; and the said bishop and justices were empowered to examine upon oath touching the truth of the said accounts; and after the said accounts were allowed a duplicate was to be transmitted to be kept amongst the records of the Sessions of the county.

By an act of the 6th year of Queen Anne, c. 70., after reciting the act of King William, and that the conservators had in part accomplished making the river navigable; but had not completed the same for want of deepening the channel in a particular part of the river, and for want of a half lock at a place called *Knapbridge* for performance whereof it would be necessary to advance a considerable sum of money, notwithstanding the large sum already disbursed by the conservators which by an account taken and allowed by the justices of the Quarter Sessions of the 17th of July then last, appeared to have been 3566*l.* 9*s.* 5*d.*;

It was enacted that an additional toll should be collected and paid in respect of every vessel that should pass through the said half lock;

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And it was further enacted that after the conservators should be reimbursed their principal and interest already expended or to be by them expended in making the river navigable, and in repairing the locks and collecting the duty, together, with their costs, charges, and expences which the said justices at the Quarter Sessions were authorised and required to allow as by the said former act was directed, that then the tolls were to be reduced to certain sums mentioned in the act.

The accounts were examined and allowed by the justices at the Quarter Sessions; but the bishop was not present as a party to such examination and allowance.

The commissioners for charitable uses having afterwards taken upon themselves to examine the same accounts, by their decree disallowed many sums which had been allowed by the justices at the Quarter Sessions.

The trustees for the conservation of the river *Tone* took exceptions to this decree, upon the ground that the commissioners of charitable uses had no authority to examine and state the accounts.

Mr. *Attorney-General*, Mr. *Pauncefort*, and Mr. *Browne* in support of the exceptions, contended, that although the act did not contain any words of exclusion of the commissioners of charitable uses, yet that they were in effect excluded, for that every establishment of a new jurisdiction implies a negative as to others, as in the establishment of summary jurisdictions; and that otherwise the method of passing the accounts prescribed by the act would be fruitless and nugatory.

That as to the objection that the bishop was not a party to passing the accounts it was a sufficient answer that he was not made one of the *quorum* by the act.

Mr. *Noel*, Mr. *Fazakerley*, and Mr. *Floyer* for the respondents, insisted that many sums had been very improperly allowed by the justices at quarter sessions, such as for entertainments for the sheriffs and juries, and interest upon interest from year to year on the sums laid out. That there was nothing in the act to exclude the jurisdiction of the commissioners of charitable uses, any more than the jurisdiction of the *Chancellor*; and that in fact the accounts had never been allowed according to the act, for that the bishop was a material person in passing the accounts; the words any five

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or more of them referring to the aggregate body of the justices.

LORD CHANCELLOR.—

On this exception two questions arise : first, whether by this act of parliament, the bishop and justices have not the sole and exclusive authority of stating and passing these accounts ; and secondly, whether the accounts have not been duly passed under the act of parliament, and if so, whether they are not conclusive.

The first question is the principal one, and the determination of which will govern my opinion.

It is necessary to consider the authority given by the act.

The jurisdiction here given is a summary jurisdiction, which is final, unless appealed from, and implies a negative of other jurisdictions. If the bishop and justices should neglect to put this power into execution, a *mandamus* will lie: where that is so, it would be to overturn the act to interfere in the manner proposed. It is objected, that although the surplus only is given to the charity, yet that it is impossible to ascertain what that surplus is without taking the accounts : but it is only the surplus to which the charity is entitled, and the commissioners have no authority to fix and settle what that is. To hold that they have, would be productive of the most important consequences, for many things with which the commissioners have nothing to do must be determined, in order to ascertain and fix the amount of a surplus : before the surplus of a personal estate left to charitable uses can be ascertained, all the questions upon debts and legacies must be disposed of. If such an account be taken in this court, the commissioners cannot overrule it. If a general account is wanted, this court must be applied to, for otherwise all kinds of property would be subjected to the determination of the commissioners.

It is not very material at present to consider whether these accounts have been passed pursuant to the act. If any fraud or collusion has taken place, it will be necessary to come into this court. I think it doubtful, whether, by the act, the bishop is made one of the *quorum*, but that is a question proper for a court of law.

His Lordship declared, that by the acts of parliament of 10th and 11th of King William, and 6th of Queen Anne, a summary jurisdiction is given to the bishop and justices to examine and pass the accounts in question, according to the method thereby prescribed ; and that therefore the commia-

sioners of charitable uses had no authority to re-examine, state, or pass the accounts, and therefore allowed the exception, and reversed the decree. (1)

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(1) Reg. Lib. A. 1738. fo. 642.

GUGELMAN v. DUPORT.

JOHN GUGELMAN, Executor of JANE }
DUPORT } Plaintiff; (1)
and
JOHN DUPORT, MARY WATSON, Ad- }
ministratrix of ROBERT WATSON and } Defendants.
Others }

February 9th, 1738.

FRANCES DUPORT, by her will, bearing date the 27th of August, 1725, devised to her grandson the defendant, *John Duport*, and the heirs of his body, all her plantations and lands, upon condition that he first paid 1,000*l.* to her granddaughter, *Jane Duport*, at her age of twenty-one years or marriage, which should first happen, and she thereby charged her said lands and plantations with the said sum of 1,000*l.* and interest for the same. And she empowered *Robert Watson*, her executor, to raise and pay the same out of the rents and profits of the said premises, and to keep the said plantation and other lands in his own possession till the said 1,000*l.* should be so raised and paid; and in the mean time to pay the said *Jane* interest, after the rate of 5 *per cent. per annum* for the same, towards her maintenance, to commence from the time that *Debeuzes* debt (which was a mortgage upon the estate) should be fully paid, which she earnestly desired might be first done.

F. D. by her will, devises an estate to her grandson, upon condition that he first paid to her granddaughter 1,000*l.* at the age of twenty-one, or marriage, and charged the estate therewith, and empowered her executor to raise the same out of the rents and profits of the estate, and to keep the same in his own possession till it should be paid, and in the meantime to

pay her interest to commence after the payment of a mortgage debt upon the estate; the executor entered into possession of the estate, and received sufficient rents and profits to pay off the mortgage and the portion; but died insolvent without having satisfied the portion; held that the estate was not discharged from the portion by the receipt of the executor, but that the portion with interest was to be raised by sale or mortgage of the estate.

(1) This case is taken from Lord *Hardwicke's* Note-book, except the judgment, which is taken from two manuscript reports.

GUGELMAN The devisee *John Duport*, and the legatee *Jane Duport*,
 v. were both infants at the time of the death of the testatrix.
DUPORT. The executor, *Robert Watson*, entered and received rents
 and profits sufficient to pay off the mortgage, and to satisfy
 the portion. The mortgage was paid ; but the executor died
 insolvent, without having satisfied any part of the portion.

The bill prayed that the 1,000*l.* portion might be raised by sale of the estate.

Mr. *Chute* and Mr. *Serjeant Burnet*, for the plaintiff, contended that although the trustee had received sufficient to have satisfied the portion, yet that the plaintiff had still a right to come upon the estate. That the devise to the defendant was conditional, and that he could not take till that condition was performed. That the portion was expressly charged upon the estate, and that the power subsequently given to the executor, would not weaken the claim upon the estate, and cited the cases of *Tompkins v. Tompkins*, Prec. in Cha. 397., and *Oldfield v. Oldfield*, 1 Vern. 336.

Mr. *Fazakerley* and Mr. *Clarke*, for the defendant *John Duport*, insisted that the executor having received sufficient out of the estate to pay the portion, became a trustee of what he had so received for *Jane Duport*, and that the land having borne its burden, ought to be discharged, and cited *Corbet's* case, 4 Co. 81., and *Thomasin v. Mackworth*, Carter 77. That if a tenant by elegit is put out of possession by a stranger, he shall be accountable for the profits during that time ; but otherwise, if put out of possession by the owner, Anon. 1 Salk. 153., and *Carter v. Barnadiston*, Mich. 1720, 1 P. Wms. 505, 518., where a testator directed that his executor should receive the rents of his estate for payment of his debts and legacies, and made the same person executor and tenant for life of the estate ; it was held by Lord *Macclesfield*, after the death of the tenant for life and executor, that the estate should only be liable until the debts and legacies might have been paid.

9th Feb. 1738. LORD CHANCELLOR.—The rule of this Court is not to incline to such a construction of wills for raising the portions of children and grand children, as may tend to weaken their security. The question is, whether the portion of 1,000*l.* and interest remains as a charge upon the estate, or whether that sum having been raised out of the rents and profits by *Robert Watson*, the executor, the land is to be taken as discharged, either in the whole or *pro tanto*, according to what he has received? I admit that where trustees

are created for the benefit of a *cestui que trust*, if the trustee enters and receives the rents to an amount sufficient to discharge the trust, the estate is to be taken as having borne its burthen, and the *cestui que trust* must take his personal remedy against the trustee for his misapplication of the profits : (1) but these cases are all of this kind where there is a trust for raising money, and the trustee enters *eo nomine* for the purpose of raising it. In such case the *cestui que trust* must look to his trustee, and the land shall be charged no longer than was necessary for the purpose of raising the money, the interest of the trustee amounting to no more than a tenancy by elegit, and of this description are all the cases cited, 1 Vern. 386. 1 Salk. 153., and *Carter v. Barnadiston*, in which I was of counsel, and in which it was held that the executor took only an estate in the nature of an estate by elegit, being an uncertain chattel interest for the payment of debts and legacies which could continue no longer than until such time at which they might have been paid, and was then to determine ; but the present case is different, for here is a devise to the heir at law, upon condition which operates as a limitation, and gives a right of entry to the legatee ; the daughter therefore had a legal estate, and a legal remedy. Under the second clause, part of the inheritance might have been sold ; and as to the last clause, upon which the doubt arises, and which has been relied upon as making the whole a trust for raising the portions, I think that it ought not to weaken the security before given for the portion ; for that clause seems to have been intended for the ease and benefit of the devisee of the estate, that the incumbrances might be discharged by receipt of the rents during his minority, and cannot add to or weaken the security for the portion. Besides, there was another reason why the trustee should enter ; namely, to satisfy the mortgage. It cannot, therefore, be said that the trustee entered as trustee for the daughter to raise the portion, but as trustee for the devisee to pay off the incumbrances.

His Lordship declared that the charge subsisted on the estate, and was to be raised by mortgage or sale of the estate in question, together with interest for the same from

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v.
DUPORT.

(1) So *Juxon v. Brian*, Prec. in Cha. 336. Anon. 1 Salk. 153. *Hutchinson* 143. *Carter v. Barnadiston*, 1 P.Wms. v. *Massareene*, 2 Ba. & Bea. 49. 505, 518. *Oldfield v. Oldfield*, 1 Vern.

GUGELMAN the 25th of December, 1733, being the time when the mortgage to *James Debeuze* was satisfied. (1)
 v.
 DUPORT.

(1) Reg. Lib. A. 1738. fo. 366.

ANONYMOUS. (1)

February 12th, 1738.

1 Atk. 519. WHERE money by an order of this Court is paid into the Accountant General's hands to be placed in the bank, till it can be laid out according to the directions of a decree; if you move for an application of this money, you must not only have a certificate that the money was paid into the bank, but that it is actually in the bank at the time of the motion made.

(1) This case is taken from *Atkyns*; it is not to be found in Lord Hardwicke's Note-book.

ANONYMOUS. (1)

February 12th, 1738.

1 Atk. 491. Where there is a trust, or any thing in the nature of a trust, notwithstanding the Ecclesiastical Court have an original jurisdiction in legacies, yet this Court will grant an injunction. A BILL brought for an injunction to stay a suit in the Ecclesiastical Court for a legacy, because that Court cannot make a legatee refund in case of a deficiency of assets, and this being the day for shewing cause why the injunction should not be dissolved, the counsel for the plaintiff relied on the case of *Knight v. Clarke*, cited in the case of *Noel v. Robinson*, 1 Vern. 94. where the Lord Chancellor said, there was a difference between a suit for a legacy in the Spiritual Court, and in this Court; if in the Spiritual Court, they

(1) This case is taken from *Atkyns*; it is not to be found in Lord Hardwicke's Note-book.

would compel an executor to pay a legacy, without security **ANONYMOUS.** to refund, there shall go a prohibition.

The *Lord Chancellor* continued the injunction till the hearing, because the plaintiff is an executor in trust only, for where there is a trust, or any thing in the nature of a trust, notwithstanding the Ecclesiastical Court have an original jurisdiction in legacies, yet this Court will grant an injunction, trusts being only proper for the cognizance of this Court.

The rule in this Court now is varied, since the case in *Vernon's Reports*, for legatees are not obliged to give security to refund upon a deficiency of assets.

His Lordship mentioned a case where a woman, an infant, was entitled to a legacy upon her marriage; the husband instituted a suit in the Ecclesiastical Court for it, which he might do; but upon the executor's bringing a bill, and suggesting this matter to the Court, an injunction was continued till the hearing of the cause; (1) and the same order was made in the present case.

Where the husband of an infant institutes a suit in the Ecclesiastical Court for her legacy, upon the executors bringing a bill, and suggesting this matter to the Court, an injunction will be continued to the hearing.

injunction will be continued to the hearing.

(1) See *Hill v. Turner*, ante p. 195. *Jewson v. Moulson*, 2 Atk. 420. cited in *Pre. in Ch.* 548. *Wind v. Jekyl*, 1 P. Wms. 575.

DEGGS v. COLEBROOK. (1)

February 19th, 1738.

THE *Lord Chancellor* said in this cause, that he would not, in any one particular case, oblige a plaintiff to pay more than 20s. costs to a defendant (after answer put in) on the amendment of the bill, because it had been the constant rule of this

1 Atk. 396. Upon payment of 20s. costs, bills may be amended after answer put in, but the *Lord*

Chancellor said he would consider how to make a more adequate compensation to a defendant for the future, after a long answer, and other necessary proceedings on the part of the defendant. (2)

(1) This case is taken from *Atkyns*; it is not to be found in *Lord Hardwicke's Note-book*.

(2) Though a plaintiff amends his bill several times, yet he shall not pay

taxed costs, but only 40s. unless it be a case of particular oppression, *Masse-rene v. Lyndon*, 2 Bro. Ch. Rep. 291. or unless the amendments be frivolous, *Bennet v. Green*, 1 Cox. 253.

DEGGS Court, and established at first, to prevent the inconvenience
v. of entering too largely into the merits of the cause, before
COLEBROOK. the proper time for hearing the merits.

In Lord Chancellor *King's* time, there was an attempt to vary from this rule, but it did not answer; but Lord *Hardwicke* said, he would notwithstanding consider how to make a defendant some amends for being put to a great expense, by allowing him a more adequate compensation, than only twenty shillings costs, on the plaintiff's amending his bill, after a long answer, and other necessary proceedings on the part of the defendant.

HOBBS v. TAITE.

JOHN HOBBS and Another, Executors of ANN HOBBS deceased	} Plaintiffs ; (1)
and	
WILLIAM TAITE and THOMAS SMALL, Executors of NATHANIEL HARDY	} Defendants.

February 21st, 1738.

Nathaniel Hardy being indebted to his NATHANIEL HARDY, by his will, dated the 4th of September, 1736, bequeathed as follows :—

servant for wages, by his will gives to her, in consideration of her great care and trouble about him, during his long illness, the sum of 250*l.*, and also all his household goods, furniture, and linen; the servant is entitled both to her wages and legacy. (2)

(1) This case is taken from Lord *Hardwicke's* Note-book.

(2) Where a legacy either exceeds or is equal to the debt and nothing but a plain general legacy is given to the creditor, it is a general rule that the legacy is a satisfaction of the debt, per Lord *Hardwicke*. *Richardson v. Greese*, 3 Atk. 68. *Talbott v. Shrewsbury*, Pre. in Ch. 394. *Fowler v. Fowler*, 3 P. Wms. 253., but the Court has been fond of distinguishing cases out of the general rule, per Lord *Hardwicke*, 3 Atk. 69. *Mathews v. Ma-*

thews, 2 Ves. 635. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529 and 564., and therefore, where there has been a direction for the payment of debts and legacies, *Chancey's* case, 1 P. Wms. 410. *Richardson v. Greese*, 3 Atk. 68., or where the legacy is not equally beneficial as to the time of payment, *Atkinson v. Webb*, Prec. in Ch. 236. *Clark v. Jewell*, 3 Atk. 96. *Mathews v. Mathews*, 2 Ves. 635. or if the legacy be given on a contingency, *Nicholls v. Judson*, 2 Atk. 300. or be not *ejusdem generis* as the debt, *Eastwood v.*

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v.
TAITE.

" I give to *Ann Hobbs*, now living with me, in consideration of her great care and trouble about me, during my long illness, the sum of 250*l.*, and also all my household goods, " furniture, and linen."

Ann Hobbs had lived as a servant with the testator for a considerable time previous to his death, and at that time he was indebted to her for wages, which he had kept in his hands, and paid her interest for the amount.

Ann Hobbs being dead, having in her lifetime been paid her wages, amounting to the sum of 87*l.* 15*s.* by one of the executors of the testator; the executors of *Ann Hobbs* brought a bill for the satisfaction of 250*l.*, and interest; the executors insisted that the monies paid to her for wages should be allowed in part payment of the legacy.

Mr. *Attorney-General* and Mr. *Browne* for the plaintiffs, insisted that both the sum due for wages, and also the legacy, were due, the latter being intended as a bounty, and not as a satisfaction of a debt, and cited *Chancey v. Wootten*, 1 P. Wms. 408, and 10 Mod. 399.

Mr. *Owen* and Mr. *Car*, for the defendants, contended that from the expressions used, it was clear that the testator did not intend to give a bounty beyond what was due for wages, the consideration expressed being only that which was a duty to do.

The *Lord Chancellor* decreed that the legacy should be paid, and interest at 4 *per cent.*, and costs.(3)

Vinke, 2 P. Wms. 614. *Tolson v. Collins*, 4 Ves. 483; legacies are not presumed to be given in satisfaction of debts. Nor is a legacy a satisfaction for an uncertain debt depending upon a running and open account, *Rawlins v. Powel*, 1 P. Wms. 298., or for a debt contracted after the making of the will, *ib.* *Thomas v. Bennett*, 2 P. Wms. 343. *Mascal v. Mascal*, 1 Ves. 324. And it seems that a debt due upon a negotiable bill of exchange will not be adeemed by a legacy, *Curr v. Eastabrooke*, 3 Ves. 564. and between parents and children, and strangers, there

is no difference in the application of this general rule, *Tolson v. Collins*, 4 Ves. 483., but see *Wood v. Briant*, 2 Atk. 521. *Seed v. Bradford*, 1 Ves. 501. *Chave v. Farrant*, 18 Ves. 8. And parol evidence may be admitted to repel the presumption that a debt is satisfied by a legacy, see *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. *Druce v. Denison*, 6 Ves. 385, and though the will affords an inference in favour of the presumption, *Wallace v. Pomfret*, 11 Ves. 542.

As to satisfaction of portions, see *Bellasis v. Uthwatt*, ante, page 273.

(3) Reg. Lib. A. 1738. fo. 260.

WILLIS v. SHORRAL.

JOHN WILLIS and Others Plaintiffs; (1)
 and
 HUGH SHORRAL, Son and Heir of
 JOHN SHORRAL, MARY BULK-
 LEY, and Others, Daughters and Heirs
 of THOMAS BULKLEY } Defendants.

February 24th, 1738.

1 Atk. 475.
 Under a settlement it was provided, in the events which happened, that *J. B.* and his heirs should, within one year after his wife's death, pay 100*l.* to such person as she should by will appoint, and in default

of payment, that it should be lawful for *J. M.* and his heirs to raise the same, with interest, by making leases of certain lands; the wife by her will appoints the 100*l.* to be paid in trust for the plaintiffs; the heir of the husband levies a fine of the estate, mortgages and releases the equity of redemption to the mortgagee: held, though five years had passed subsequent to the levying the fine, without any demand having been made, that the plaintiffs were entitled to the 100*l.* with interest, and not barred by the fine, the power of leasing being a naked power in a stranger, not party or privy to the fine.

John Bulkley died in the year 1697, without issue, and *Anne* in the year 1723; having by her will, dated the 5th of September, 1721, in pursuance of the power reserved in the settlement, directed the 100*l.* to be paid in trust for the plaintiffs, in different proportions.

Application being made to *Thomas Bulkley*, the heir of *John Bulkley*, in respect of this sum of 100*l.*, he answered that the power was of no effect.

In 1729, *Thomas Bulkley* levied a fine of the premises in question, and mortgaged them to *John Shorral*, and in 1736 released the equity of redemption to him.

(1) The statement of this case, the arguments of counsel, and the concluding memorandum are taken from Lord

Hardwicke's Note-book; the judgment from a manuscript report.

WILLIS
v.
SHORRAL.

At the time of the mortgage, *John Shorral* had not any notice of the claim to the 100*l.*; but it was admitted that he had such notice previous to the release of the equity of redemption.

Five years elapsed after the fine had been levied, before any demand was made by the appointees of the 100*l.*, and the question was whether that claim was barred.

The bill prayed that the 100*l.* might be raised, and paid to the plaintiffs.

Mr. *Fazakerley* and Mr. *Fenwick* for the plaintiffs contended, that the fine in this case was no bar, the power to make leases being only collateral to the land; and the rule being, that nothing can be barred by a fine but what is first divested, and that if this be considered as a trust, it cannot be barred, and cited *Bovey v. Smith*, 1 Vern. 60. *Welden v. Duke of York*, 1 Vern. 132. *Drapers' Company v. Yardly*, 2 Vern. 662 & 194. Cro. Eliz. 226. 1 Mod. 217. 5 Co. *Saffyn's case*. Bro. Fine 123. and *Zouch v. Stowell*, Plow. Com. (2)

Mr. *Wilbraham* and Mr. *Ford* for the defendants, insisted, that with regard to the effect of fines, courts of equity governed themselves by the same rules as courts of law; that the present was more than an equitable charge on land, for that it was a power to create a legal interest, and that a fine will bar all powers in the party levying it, and cited Sir *Nicholas Stourton's case*, cited in *Lingard v. Griffin*, 2 Vern. 189. that an equity of redemption may be barred by a fine.

LORD CHANCELLOR. The power vested in *Moreton*, the trustee, is a naked power, and conveys no interest in the land, but is merely collateral to it. All the cases in which a fine bars by nonclaim, are where the party concluded by it, has some claim, right, or interest, to or in the land. (3) This appears plainly by the saving in the 4 Hen. 7. c. 11., which excepts only such right, claim, or interest, as the party had; under this power the trustee could not enter or do any thing, but simply execute a lease; if he had done so, the lessee, after five years, would have been barred. This is something like an *interesse termini* before it commences, or a judgment before an extent, in which cases the party is not

Feb. 24th or
25th, 1738.

(2) Plowd. 355. Jenks Cent. 266. 237 a. *Albany's Case*, 1 Co. 110 a.

(3) See *Margaret Podger's Case*, *Digges's case*, 1 Co. 174 a. *Edwards v. Slater*, Hard. 415.

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barred, whatever number of years elapse before the commencement of the term or the interest executed. The case of a devise of lands to executors for the payment of debts is a chattel interest, and so within the statute. Powers reserved to the party levying the fine are extinguished, because having parted with all his interest in the land, he necessarily destroys his right to all powers annexed or adhering to it, but that is not the case of a fine levied by a terre-tenant, to bar a naked power vested in another.

I do not enter into the question of how far equitable charges may be barred by a fine. I believe that where a party has such an equitable interest in lands as might be barred by a fine if it were a legal estate, a fine levied by one not a trustee, might bar it; and so possibly it might be of bare equitable charges, but this I do not determine.

In the present case there is a legal power of raising the money which is not barred by the fine, and this without touching upon the other question is, in my judgment sufficient to support the right to the money. Indeed in this case, if the demand might have been barred as an equitable charge, it would have been hard in a court of Equity to have said that it was so, as so many demands appear to have been made, and as the purchaser appears to have had notice of the charge.

"I was of opinion that the power of leasing being a naked power in a stranger not party or privy to the fine was not barred thereby, and consequently that the plaintiffs were entitled to satisfaction for this 100*l.* and interest at 4*l.* per cent. and costs, whereupon the defendants, the heirs at law of *Thomas Bulkley* submitted in Court to pay the same in three months which was decreed accordingly, with liberty to the plaintiffs to apply for further directions, in case they made default in payment."

THE ATTORNEY-GENERAL, at the Relation of the MASTER and WARDENS of the COMPANY of COOPERS of LONDON } Plaintiffs ;(1)

and

STEPHEN MONTAGUE and OTHERS, Executors of JOSEPH BOSWORTH, FRANCIS PYLE, and OTHERS, Trustees and Guardians of the CHARITY SCHOOL of ROMFORD, and the Churchwardens and Overseers of that Parish, BENJAMIN LEWIS and SUSAN, his Wife, the Heir at Law of JOSEPH BOSWORTH . . } Defendants.

February 26th and 27th, 1738.

JOSEPH BOSWORTH by his will dated the 6th of July 1730, gave to *M. S.* his freehold messuage at *Romford* for life, and after her death he gave the same to the Charity School at *Romford* so long as it should continue to be endowed with charity; but in case the sum of 1,000*l.* after mentioned should be paid to the *Cooper's Company* for the uses after mentioned then he gave the said house to the said company, the rents and profits thereof to be distributed among the alms-people belonging to the alms-houses of *Ratcliffe*, over and above what is now allowed them by the donor of the said almshouses, and then proceeded as follows:—"Whereas there is owing "to me from *John Stevenson* and Company now resident at *Romford*, the rents and profits thereof to be distributed amongst the alms-people belonging to the alms-houses at *Ratcliffe*, and he directed that the interest and profits of the said 1,000*l.* which he gave to the said Company should be applied for the building four alms-houses near *Romford*;

The debt of 1,000*l.* devised by the will turned out to be only 365*l.*; Held that the 1,000*l.* not being received by the *Cooper's Company*, the devise to the Charity School at *Romford* was absolute, and that the sum of 365*l.* was not a lapsed legacy, but that the same should be placed out, and the interest should not be applied to the building the alms-houses at *Romford*, but amongst the alms-people belonging to the alms-houses at *Ratcliffe*.

(1) This case is copied from a Report found amongst the papers of Lord *Hardwicke*, the reasons for the decision are in his Lordship's handwriting.

The case is reported in 1 Atk. 435, under the name of the *Attorney-General v. Pyle*.

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GENERAL.
v.
MONTAGUE.

"*Oporto in Portugal*, 1,000*l.* and upwards, which sum I give to the Company aforesaid, and the interest and profits thereof to be applied for the building four alms-houses near "*Romford*," and he gave the residue of his estate to his sister in tail, with remainders over, and made her and two others executors.

M. S. being dead, the devise of the house came into possession.

The debt of 1,000*l.* turned out to be only 365*l.*

This occasioned a doubt what was to be done with the house and the 365*l.*

The information was brought to have the directions of the Court.

Two questions were made,

1st. Whether the Charity School was entitled to the house?

2ndly. How the 365*l.* should be applied?

The first depended upon the question whether the condition upon which the devise of it was made was performed, inasmuch as the 1,000*l.* could not be received by the *Cooper's Company*.

But the Court was of opinion that it was not, and therefore the devise to the Charity school was absolute.

As to the 2nd it was insisted for the residuary legatees, since the end for which the 1,000*l.* was given could not be answered, which was to purchase the house from the Charity Schools at *Romford* for the benefit of the alms-houses at *Ratcliffe*, that the 365*l.* part of the 1,000*l.* must be lapsed, but that was overruled.

It was then insisted for the town of *Romford*, that the 365*l.* ought to go as the 1,000*l.* would have gone, to build the almshouses at *Romford*, and not to the almshouses at *Ratcliffe*, which were not intended to have any benefit from the 1,000*l.*

But since the town of *Romford*, were to have the benefit of the house, by its being applied to the use of the charity school there, it was held that this 365*l.* ought to go to the same charity as the house would have gone, in case the whole 1,000*l.* had been paid, that is to the almshouses at *Ratcliffe*; because the house was the thing directed to be purchased for their benefit; they could not possibly have that, and therefore equity would that they should have the consideration which was to have been given for it, *i. e.* as much of that consideration as existed, the rule being that till the purchase takes effect, the benefit of the consideration shall go

the same way as the thing to be purchased was intended to go. ATTORNEY-GENERAL

His Lordship declared that the rents and profits of the freehold messuage at *Romford* ought to be applied to the benefit of the charity school at *Romford* so long as the said charity school should continue to be endowed with charity; and decreed the defendant *Lewis*, and his wife, the heir at law of the testator, to convey the said messuage to the defendants, the trustees of the charity. v. MONTAGUE.

And his Lordship directed the sum of 365*l.* should be placed out at interest, and that the interest arising therefrom should be from time to time distributed amongst the almspeople belonging to the almshouses at *Ratcliffe*, for the increase of their allowances, over and above what was allowed them by the donor of the said almshouses. (1)

(1) Reg. Lib. A. 1738. fo. 647.

MARY ATKINS, Mother and Administra- }
trix of MARY ATKINS } Plaintiff; (1)
and
CORNELIUS FAR Defendant.

February 27 and 28, 1738-9.

THE bill prayed payment of the sum of 500*l.* due from the defendant, upon a bond executed by him to *Mary Atkins* deceased. 1 Atk. 287.
2 Eq. Ca. Ab. 247. pl. 32.
The defendant gave a bond

to the plaintiff conditioned to pay her 500*l.* if he did not marry her within twelve months; The defendant by his answer denied that he had ever promised to marry her, and that she gave up the bond to him voluntarily, in contradiction to the bill wherein it was stated that he had fraudulently taken it away from her and destroyed it; upon evidence by one witness that the defendant had taken away the bond forcibly, and of another that he had promised to execute a new bond; it was held, that the plaintiff was entitled to the 500*l.* with interest from the filing of the bill. (2)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from a manuscript report, which has also been printed in 2 Eq. Ca. Ab. 247.

(2) But it seems, if a bond be entered into by a child in the lifetime of the parent, or of a person standing in

loco parentis, to marry a particular person after the decease of the parent, such a bond would be set aside in equity as a fraud upon the parent who disapproved of the match, and as tending to encourage the disobedience of children towards their parents. *Woodhouse v. Shepley*, 2 Atk. 535. *Cock v. Richards*, 10 Ves. 429.

ATKINS
v.
FAR.

The case made by the plaintiff's bill was, that the defendant having promised to marry *Mary Atkins*, executed a bond to her dated the 9th of February, 1732, in the penalty of 1,000*l.*, whereby after reciting that an agreement had been made between the defendant and *Mary Atkins*, that a marriage should be concluded between them within twelve months from the date of the bond; the condition of the bond was, that if the defendant did and should not according to the rites and ceremonies of the church marry the said *Mary Atkins* within twelve months after the date of the said bond, he would pay her 500*l.*;

That in the month of March following the defendant having obtained possession of the bond under the pretence of wishing to look at it, took it away, and destroyed it; that the defendant soon afterwards, upon the application of *Mary Atkins*, promised to execute another bond of the same purport as that which he had destroyed, and desired the said *Mary Atkins* to get the same drawn and prepared, and that the time and place was appointed by the defendant to meet her, in order to execute the said new bond; that at the defendant's request, she having applied (to have the said new bond drawn) to the person who drew the former bond, he found by him the very draft or copy of the former bond, and by her directions caused a bond to be drawn in the same words as the former bond was drawn; that the defendant had refused to execute it, though he had frequently promised to do so.

To this bill the usual affidavit was annexed, that the defendant had obtained the possession of the original bond. The contents of the bond were proved by the subscribing witnesses to it. It was proved by one witness, that the defendant had often expressed his intentions of marrying *Mary Atkins*, and that he had admitted having taken away and destroyed the original bond; and by another witness, that he had promised to execute a new bond, and gave directions to have it prepared.

The defendant by his answer stated, that *Mary Atkins* was a woman of bad character, and denied that he had ever promised to marry her, and stated that he had executed the original bond under an idea that it would not be of any validity against him, and that *Mary Atkins* afterwards voluntarily gave up the bond, saying that she would have nothing more to do with him, and did not within the 12 months make any application to him upon the subject, and denied

that he had ever promised to execute another bond. No witness was examined for the defendant.

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v.
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The bill was filed by *Mary Atkins*, and upon her death the suit was revived by the present plaintiff.

Mr. *Browne* and Mr. *Fazakerley* for the plaintiff.

Mr. *Attorney-General*, Mr. *Chute*, and Mr. *Noel*, for the defendant, contended, that the evidence of the defendant's having obtained possession of the bond would not be received being supported by the testimony of only one witness against the oath of the defendant in his answer. That the plaintiff ought to have shewn a demand and refusal of marriage, whereas it was not even alleged that she was ready and willing to have married the defendant, and that there was no mutuality in the contract, there being no promise to bind *Mary Atkins*, and they cited *Key v. Bradshaw*, 2 Vern. 102.

LORD CHANCELLOR.—In this case there are two ques- March 1, 1738.
tions; first, whether the plaintiff, from the nature of this case, has any original equity to come into this Court for relief; secondly, whether there is any thing, under the circumstances of the case, to bar the plaintiff of that relief.

As to the first, I think the plaintiff has such equity, which is founded on this bond having been once executed, by which the plaintiff might have had a remedy at law; and afterwards coming into the hands of the defendant, and being cancelled by him, where such case is of a bond, it gives the plaintiff not only ground for a discovery, but also relief, because the admission of the bond by the defendant's answer, or proving that there was such a one, would not be sufficient to enable the plaintiff to bring an action, because there must be a *profer in curia*, and *oyer* may be prayed thereof.

As to the second point, it is objected, that it is only proved by one witness that the defendant took this bond forcibly from the plaintiff's daughter, which the defendant hath denied by his answer upon oath; and it is generally true, that where the equity of the bill was only proved by one witness and is denied by the defendant's answer, that there is not sufficient ground to make a decree, because there is oath against oath; but the rule is misapplied here, for in this case the plaintiff's daughter was entitled to make the first oath, which she has done, and has also proved the same matter by one witness, so that this is only the oath of the defendant in his answer against two oaths; but there is no occasion to rely upon this, because the answer is not a com-

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plete denial of the plaintiff's equity, but only a confession and avoidance; and then it is not sufficient to say it is only proved by one witness, for the defendant ought to make out his avoidance; then again here is only one witness that swears to the taking of the bond by force, and cancelling it; yet there is another who swears that after the bond was got into the defendant's custody and cancelled, the defendant promised the plaintiff's daughter to execute a new bond, which could be only because he had got the former wrongfully, and cancelled it; and strongly corroborates what was sworn by the other witness, so as to take it *out of the rules of the Court, that there can be no decree where there is one oath against another*. It was further objected, that the plaintiff's daughter, by her bill, had not averred to prove in the cause that she was ready to perform her part, and to marry the defendant; but it lies upon the defendant to shew that he requested, and she refused to comply; for the condition of the bond does not oblige her to request the defendant, but puts the performance upon him.

Another objection has been taken, that it does not appear the defendant had any remedy to compel the plaintiff's daughter to marry him, there being only a recital in the condition of the bond, that such an agreement to marry each other had been made between them, but that no such agreement had been signed on her part in favour of the defendant, or any evidence of it.

The answer is, I cannot take it the defendant had no evidence of such promise, and as he has recited there was such a one, I must take it to be true, besides the Statute of *Frauds and Perjuries* does not require promises of marriage to be in writing, but only money to be given in consideration of marriage.

It has been said, it is very pernicious to give relief in such cases as this, because let the woman behave ever so ill after the bond given, yet that would be an obligation on the defendant to marry her, or pay the money. But this Court would relieve against such bond, if she became abandoned and profligate, so as to put herself under different circumstances than she was at the time of making the same; but here is no proof either that it was an improper match, or that the daughter ever misbehaved herself,

Then the case is no more than this; here is a bond given to a woman of very good character to marry her within a year, or to pay her a sum of money. As to the case of *Key*

and *Bradshaw*, 2 Vern. 102. that is a very general reason; and would hold good in all contracts of marriage to be executed, either in the Ecclesiastical Court, or by damages at law; but in that case it was clearly an improper agreement, and such as from the nature of it was not right, that the mistress should marry her servant, which might be evidence for the Court to believe she was drawn into it.

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It has been objected, that this bill is brought for recovering a penalty; but that is taking it wrong, for it is only the damages that have been adjusted and agreed on between the parties themselves; and if in an action at law upon a promise of marriage the plaintiff had recovered so much damage, the Court would not have relieved against it.

In this case the Court made a decree that the plaintiff should have the 500*l.* and interest from the time of filing the original bill, with costs. (1)

(1) Reg. Lib. A. 1738. fo. 310.

Sir ARTHUR OWEN and Others, next of Kin of ELIZABETH BRERETON, de- ceased	} Plaintiffs; (1)
and	
WILLIAM OWEN, ANN, his Wife, and ELIZABETH, his Daughter, an Infant	} Defendants.

March 3rd, 1738.

ELIZABETH BRERETON by her will dated the 19th October, 1732,—“ as to all the wordly estate with which it had ^{1 Atk. 494.} *E. B.* after giving various legacies, as to the residue of her estate, gives the same to her two nieces, and desires their father and mother to be their trustees, and declares her will to be, that her estate should be equally divided between them, and appointed them her executrices; one of the nieces having died in the lifetime of the testatrix; held that the two nieces took the residue as tenants in common, and that the moiety of the residue being undisposed of was a lapsed legacy, and must go to the next of kin. (2)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from his Lordship's Note-book, and 2 MSS. Reports.

(2) So *Bagwell v. Dry*, 1 P. Wms. 700. *Page v. Page*, 2 P. Wms. 489. *Peat v. Chapman*, 1 Ves. 542.; and see *Man v. Man*, 2 Str. 905. *Chestlyn v. Creswell*, 6 Bro. P. C. 1. *Bennet v. Bachelor*, 1 Ves. jun. 63. But if there be a joint devise, and in such case, by

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pleased God to bless her," &c. after giving certain small pecuniary legacies to each of the plaintiffs (except the plaintiff *Erasmus Owen*), and other legacies to other persons, disposes of the residue in the following manner:—"as to all the rest and residue of my estate, of what nature and kind soever the same be, I give and bequeath the same to my two nieces, *Catherine Owen* and *Elizabeth Owen*, my god-daughters, the daughters of my nephew *William Owen* and *Ann* his wife, both which I desire to be trustees for their children; and my will is, that my estate may be equally divided between my two nieces, *Catherine Owen* and *Elizabeth Owen*, whom I nominate and appoint to be my executrixes of this my last will and testament accordingly."

Catherine Owen died in the lifetime of the testatrix.

The plaintiff, as next of kin to the testatrix, claimed the moiety of the residue bequeathed to *Catherine Owen*.

Mr. *Attorney General* and Mr. *Chute* for the plaintiffs, contended, that the two nieces were, by the will, made tenants in common of the residue, and that the one, *Catherine*, having died in the lifetime of the testatrix, her moiety was undisposed of, and therefore distributable amongst the next of kin, and cited *Page v. Page* before Lord Chancellor King, 2 P. Wms. 489.; and *Holderness v. Rayner*, before Lord Chancellor Hardwicke.

Mr. *Browne*, Mr. *Fazakerley*, Mr. *Wilbraham*, and Mr. *Hopkins* for the defendants, contended, that the infant, *Elizabeth Owen*, was entitled to the whole residue, either as surviving residuary legatee or as surviving executrix.

1st. That the nieces were made joint-tenants, and not tenants in common of the residue, the words "equally to be divided" applying not to the bequest of the beneficial interest in the residue which had been before given, but to the office and authority of executrixes; and that according to the ecclesiastical law, the words "equally to be divided" would not prevent a joint-tenancy.

2ndly. That supposing the nieces to have been made tenants in common of the residue, the survivor would be entitled as executrix, it being clear that the testatrix intended to make a complete disposition of her estate, and did not

whatever cause it happens, one of the joint-tenants cannot take; the other shall have the whole. D. per Lord Hardwicke, *Dowset v. Sweet*, Amb.

175. *Humphry v. Tagleur*, Amb. 136.
Frewen v. Rolfe, 2 Bro. Ch. Ca. 220.
Balwyn v. Johnson, 3 Bro. Ch. Ca.
 455. *Beffer v. Bradford*, 2 Atk. 220.

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intend any benefit to her next of kin. That at law no part was undisposed of, the whole being vested in the executrix, and the testatrix has desired the father and mother to be trustees of the whole for their children. That by the civil law, a person could not die both testate and intestate, Just. Inst. l. 8. tit. 5., and they cited 2 Roll. Abr. 301. pl. 13., and *Bastard v. Stukeley*, 2 Jones. Rep. 130. *Hutchinson v. Vincent*, 2 Eq. Ca. Abr. 441. pl. 42. and *Hunt v. Berkley*, (1) before Sir Joseph Jekyll, 24th of June, 1731, in which case *Mary Berkley*, amongst other legacies, gave legacies to her brother and her two sons-in-law, and gave all the rest and residue of her personal estate to her said brother and sons-in-law, to be equally divided between them, and appointed them executors. The brother died three years before the testatrix, and the question being, whether the third part of the residue devised to him should go to the next of kin, or to the surviving executors; the Master of the Rolls held that the civil law giving it to the survivors, and the testatrix intending to dispose of the whole of her estate; there did not appear to be any intention that the next of kin should take any thing, and therefore decreed for the executors.

March 3, 1738.

LORD CHANCELLOR.—The first question is, whether if the two nieces had survived the testatrix, they would have taken the residue as tenants in common, and I think it is clear that they would, for it is clearly settled that the words “to be equally divided” in wills create a tenancy in common, both of real and personal estate. (2)

As to wills, it has been so often determined that a bequest of a legacy to two, equally to be divided between them, creates a tenancy in common, and that the legacy upon the death of one lapses, that the authorities cannot now be shaken, and if the ecclesiastical courts were to determine otherwise, some method would be found to controul them. It has indeed been contended, that the words to be equally divided, are not applicable to the bequest of the beneficial interest in the residue, but to the appointment to the office of executrices; but that cannot be, for the office is in law a joint authority, and cannot be so divided.

The will, therefore, having created a tenancy in common, the next question is, what will be the consequence of the death of one of the residuary legatees in the lifetime of the

(1) 1 Eq. Ca. Ab. 201, pl. 13. 243., pl. 4. and Mps. 47.

(2) See *Prince v. Heylin*, ante, p. 271, and the cases cited in the note.

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testatrix? Does the moiety of the residue, which is to be considered as a lapsed legacy, belong to the surviving executrix, or is it distributable as being undisposed of amongst the next of kin?

It has been truly said, that the civil law would give it to the executrix, the maxim being that a man, who makes a will and appoints an executor, cannot die intestate. There have been cases in which suits have been instituted in the ecclesiastical courts by the next of kin to have part of the personal estate distributed, as being undisposed of by the testator, on the ground of particular legacies being given to the executors; but prohibitions were granted to restrain them from proceeding, because by the ecclesiastical law, if a man makes a will, and appoints an executor, the whole belongs to him: and in such cases there is only a trust in the executor, which it is the province of a court of equity to see performed.

In *Page v. Page*, before Lord Chancellor *King*, the testator after several particular legacies, gave the residue to six persons, equally to be divided, and appointed them all executors; one died in the lifetime of the testator, and it was held that his sixth part should not survive to the other residuary legatees, and that they were not entitled as executors, because the testator did not intend that they should have any benefit as executors, the whole being given to the residuary legatees, it was therefore determined that the executors were trustees thereof for the next of kin, and it is well known that Lord *King* gave but little favour to the notion of making executors trustees for the next of kin. This case, on the 29th of August, 1734, was cited before Lord *Tulbot*, and followed by him, (1) and by me afterwards in the case of *Holderness v. Rayner*.

It is true, that the case of *Hunt v. Berkeley*, was differently determined; but in my opinion, the reasons of Sir *Joseph Jekyll* for his decision in that case, were not sufficient to support the decree; for he proceeded upon the ground that it was the intention of the testatrix to dispose of the whole residue of her estate, and that there was therefore no intention that any part should go to the next of kin; but that reason is insufficient, because it supposes that the next of kin take a thing which is undisposed of by the intention of the testator, whereas they take by the same title as an

(1) *Bagwell v. Dry*, 1 P. Wms. 700.

heir at law upon whom the law casts all the real estate which is undisposed of, *Farrington v. Knightly*, 1 P. Wms. 554.

William Owen, and *Ann* his wife, the father and mother of the two neices, are no more than natural guardians to take care of the legacy, for they cannot in law, be trustees, unless some interest in the thing given was actually vested in them.

His Lordship declared, that by reason of the death, of *Catherine Owen*, one of the residuary legatees, in the lifetime of the testatrix, one moiety of the residue of the personal estate was to be considered as lapsed and undisposed of by the will, and that it ought to be divided among the next of kin, according to the rule of the statute for settling intestates' estates, and decreed accordingly. (1)

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(1) Reg. Lib. B. 1738. fol. 228.

MORGAN v. MORGAN. (1)

March 3rd, 1738.

It was in this case laid down by the *Lord Chancellor* as a rule, that where a defendant pleads a decree of dismissal of a former cause for the same matter in bar of the plaintiff's demand, or his new bill, if the plaintiff does not apply to the Court, that it may be referred to a Master to state whether there is such a decree, but sets down the cause upon the new bill for hearing, it is a waiver of his right of application for such reference, and the Court will determine it.

1 Atk. 53.

(1) This case is taken from *Atkyns*. By the *Lord Chancellor's* note-book it appears that the suit was by a legatee, *William Morgan*, under the will of his mother against *Thomas Morgan*, her executor for payment of the legacy; and that there was a cross bill by *Thomas Morgan*, which amongst other things sought to establish an account settled between *William Morgan* and

his mother with respect to the father's estate; it also appears that a decree of the Great Sessions of the 12th of September, 1732, affirmed in the House of Lords, on the 21st of April, 1736, was insisted upon by the counsel for *Thomas Morgan*. By the decree the usual accounts were directed and payment decreed of the legacy. (2)

(2) Reg. Lib. B. 1738. fo. 240.

BOSANQUET and Others *v.* Earl of WESTMORELAND
and Others.

JOHN BOSANQUET and SAMUEL
LONQUET, surviving Assignees of
the Estates of SAMUEL COTTON } Plaintiffs; (1)
and JOHN COTTON }
and

Lady ELIZABETH DASHWOOD, The
Honourable JOHN FANE, The Ho-
nourable DIXIE WINDSOR, and Dr.
JOHN KING, Executors of Sir F.
DASHWOOD, THOMAS MARTIN } Defendants.
and JAMES MARTIN }

Appeal and Rehearing.

February 3rd, and March 10th, 1738.

This court
will decree
the money
paid upon a
usurious con-
tract to be
refunded,
where all
the money
in respect
of the usu-
rious con-
tract has
not been paid.

THE plaintiffs being the surviving assignees under a commission of bankruptcy issued against the two *Cottons* bring their bill for the purpose of compelling the defendants, the executors of Sir *F. Dashwood*, to deliver up to the plaintiffs, certain bonds entered into by the *Cottons* to Sir *F. Dashwood*, to come to an account with them, for what money had been received thereon, to pay the balance to them and to stay proceedings at law upon the bonds.

The plaintiffs alleged by their bill that Sir *Francis Dashwood*, in the year 1702, lent several sums of money to the *Cottons*, and for securing the re-payment thereof with interest at

(1) This case, except the judgment upon the merits, is taken from Lord *Hardwicke's* Note-book; the judgment which corresponds with the short heads of it in Lord *Hardwicke's* Note-book, from a manuscript report.

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6*l. per cent.*, which was at that time the legal interest, gave him several bonds; that in the month of December, 1710, accounts being settled between them and all interests in the bonds being paid, 10,000*l.* being secured by several bonds, remained due to Sir *F. Dashwood*; that Sir *F. Dashwood* soon after demanding payment of the money due on the bonds, and the *Cottons* being unable to pay the same, Sir *F. Dashwood* insisted that for the future they should pay him interest at the rate of 10*l. per cent. per annum* for the 10,000*l.* and sign an agreement for that purpose; and that if they would not pay such interest he threatened to put the bonds in suit; whereupon the plaintiffs signed an agreement in writing to pay such interest; that the bankrupts in pursuance of such agreement paid to Sir *F. Dashwood*, from 1710 to 1714 inclusive 1,000*l. per annum*, as the interest for the 10,000*l.*, besides the same interest for 1,500*l.* borrowed of him on the 11th of April, 1711, on their promissory note, and which was discharged in November, 1712, and for the sum of 1,000*l.* borrowed of him on the 11th of December, 1716, on their promissory note, which was re-paid in the March following; that in the year 1715, the bankrupts paid the testator 500*l.* in part payment of a bond debt and soon afterwards borrowed 500*l.* upon a bond and promissory note, dated 11th May, 1716, whereby they became indebted to him in 10,000*l.* for which they paid interest to him, at 10*l. per cent.* from that time to 1724; that the bankrupts in July, 1724, paid the testator 2,000*l.* in discharge of one of their bonds, and since his death paid the defendants, his executors, the further sum of 3,000*l.*; and the plaintiffs insisted that the defendants, the executors, were overpaid by several thousand pounds.

The defendants, the executors, by their answer admitted, that they had found a note or memorandum, dated the 10th of January, 1709, whereby the bankrupts agreed that what sums of money should remain due from them on bonds from Lady-day, 1710, should be paid as soon as might be, and that interest should be allowed after the rate of 10*l. a-year* for every 100*l.* till the whole should be paid; and that the bankrupts, about July, 1724, paid the testator 2,000*l.* in part of the 10,000*l.* which they then owed him; and since his death that they had paid the defendants, his executors, the further sum of 3,000*l.* in further part of the principal money owing to his estate;

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and they said, that since Sir *F. Dashwood's* death there was found amongst his effects, besides a bond from the bankrupts to Sir *F. Dashwood* (which had been delivered up) five bonds, all executed by the said bankrupts to Sir *F. Dashwood*, and they believed that the bankrupts were indebted to Sir *F. Dashwood*, at his death in 8,000*l.* principal and interest for the same, at the rate of 6*l.* for every 100*l.* from Lady-day, 1724; and after his death, and before their bankruptcy at several times, they had paid the defendants the said 3,000*l.* part of the said principal, and 1,350*l.* on account of interest at 6*l. per cent.* for every 100*l.*; And that in June, 1728, the said defendants made up an account of what was received on account of the said 8,000*l.* and interest after the said testator's death, computing the interest only to Lady-day, 1709, and on the balance of such account 5,000*l.* appeared due for principal and 705*l.* for interest, and that such account being then delivered to the bankrupts, they acknowledged such balance was justly due, and promised to pay the same; and the said defendants, the executors, insisted that if the said bankrupts paid their testator any greater interest for the money they owed him than after the rate of 6*l. per cent.*, the same being actually paid by the bankrupts themselves, the plaintiffs could not revoke such payments which were voluntarily made, and they admitted assets of their testator sufficient to answer the plaintiffs' demands.

It was proved in the cause that, two of the bonds had been paid off and delivered up; and that a person was employed by the executors and the *Cottons* to draw out and state an account between the executors and the *Cottons*; whereby a balance was found due to the executors; and it was proved that the *Cottons* declared themselves satisfied with the account and promised to pay to the executors the balance. It was likewise proved that on the 9th of April, 1711, and on the 10th of December in the same year, general receipts for interest on the 10,000*l.* had been given.

It was decreed at the Rolls that it should be referred to the Master to enquire what was really and *bond fide* advanced and paid by the said Sir *F. Dashwood*, to the said *Samuel* and *John Cotton* the bankrupts, and to compute interest for the same after the rate of 6*l. per cent.*

per unum being legal interest, at the time of entering into the said bonds, and the Master was to enquire and see what was paid by the said bankrupts to the said testator in his lifetime, or to the defendants, the executors, since his death on account thereof, and so much as should appear to have been paid to the testator, and to his executors for interest over and above legal interest was from time to time, as the same was so paid, to be applied to sink the principal; and the said Master was to compute interest only for the residue of such principal money, and if the Master should find any thing due for principal and interest on the said bonds, then upon the plaintiffs' paying the same, the bonds were to be delivered up to the plaintiffs; but if the said Master should find that the said bankrupts had paid more than was due upon the said bonds, then it was ordered that the defendants, the executors, should repay what should appear to have been so overpaid, and deliver up the bonds to the plaintiffs.

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Lord Talbot, upon appeal, varied the decree as follows; viz. that these words [inquire what was really and *bond fide* advanced and paid by the said Sir F. Dashwood, to the said Samuel and John Cotton, the bankrupts] should be struck out of the decree, and these words [see what the principal sums mentioned in the several bonds entered into by the said Samuel and John Cotton, the bankrupts, to the said Sir F. Dashwood, amounted to] should be inserted instead thereof.

Nov. 11, 1734.

From this decree, made by Lord Talbot, the defendants presented a petition of rehearing, but by their petition they did not complain of that part of the decree whereby it was directed, that if the Master should find that the bankrupts had paid more than was due on the bonds in the pleadings mentioned, that then the defendants, who had admitted assets to pay the plaintiff's demands, should repay the said plaintiffs what should appear to be overpaid, and deliver up the bonds to the plaintiffs.

LORD CHANCELLOR.—The direction for refunding not being particularly objected to by the petition of re-hearing, I ordered the cause to stand over on defendant's payment of the costs of the day; the defendants being at liberty to amend their petition of re-hearing in that particular.(1)

Feb. 3, 1738.
Direction for
refundng not
being objected
to by the pe-
tition of re-
hearing, cause
ordered to

stand over, defendant paying the costs of the day.

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On the 10th of March, 1738, the cause came on again to be re-heard.

Mr. *Attorney-General*, Mr. *Fasakerley*, and Mr. *Hamilton* for the defendants, the executors of Sir *F. Dashwood*.

The decree ought not to extend to any enquiry as to the bonds that were cancelled and paid off, nor the account to any but the subsisting bonds.

First. Consider what the law allows as to usurious contracts ; if money is paid on an usurious contract, the obligor cannot recover it back again, *Tomkins v. Barnet*, 1 Salk. 22. Skin. 411.

If money be paid upon a mistake, or mere deceit, it may be recovered in an action for money paid and received for the party's use : in *Astley v. Reynolds*, 10l. paid more than was due, in order to get his goods out of pawn ; action brought, *Raymond*, *Page*, and *Probyn*, thought this case differed from that in Salk. upon the compulsion ; *Lee, J.*, doubted upon that, and it was adjourned.(1)

The determination that after payment of the money, the party to the usurious contract may be a witness, shews it was not apprehended that any remedy could be had for re-funding, *Long's case*, Sir Thomas Raymond, 191.

Second. No ground for a court of equity to carry this farther than the law would do ; for the act of parliament is the only ground on which this Court can proceed. Such a precedent may tend to overhale things after a great length of time, when they are incapable of explanation. All these bonds are distinct securities, and do not run into one another ; and there is no instance where money has been paid upon one transaction, that it has been applied to another independent transaction ; besides, the stated account and agreement to pay 5,000l. and interest amounts to a waiver, *Walker v. Penrin*, Pre. in Ch. 50.

Mr. *Browne*, Mr. *Noel*, Mr. *Roberts*, and Mr. *Murray*, for the plaintiffs.

First Objection. That there ought to be no decree for re-funding what has been overpaid ; because the law will not admit of recovering back what has been paid upon an usurious contract.

We do not come here for a legal demand out of assets ; but suppose we did, usury is unlawful in itself. In *Holmes*

(1) 2 Strange 915., it is stated in Strange that the plaintiff had judgment.

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v. *Hall* (2) it is said, that an action would not lie to recover money upon an usurious contract. *Tomkins v. Barnet*, 1 Salk. 22. opinion of *Treby*, C. J.; a material difference between that case and this; it did not appear that there was an over payment; it is said part of the money had been paid, which might not be so much as was really lent; and it was only a *nisi prius* opinion; but the answer is, the verdict in an action on the statute could not be given in evidence, in a suit to recover the surplus.

But the case here is different from what it is at law; this Court lays hold of it by way of relief against the penalty of the bonds; and in order to that relief an account must be directed, and on the account the Court cannot allow more than is due in conscience. The rule of equity, *æquitas sequitur legem*, does not follow in all cases; in cases of young heirs, and marriage brokage bonds. Suppose upon a mortgage there had been an agreement to accumulate interest, which had been paid on an account, it would be decreed to be refunded. Where there was an oppressive accumulation of interest, the Court decreed a refunding, *Broadway v. Morecraft*. (3)

Second Objection. That the two bonds which have been delivered up are to be considered as a separate independent transaction.

Answer. It will appear that the 10,000*l.* has always been considered as one gross sum, and the interest paid on it entire; the securities being different will not vary the case. The 2,000*l.* was paid on those bonds in July, 1724, the note was given in 1710; as to the account insisted upon, it was not stated; there was nothing conclusive.

Besides, the *Cottons* were at the time in such circumstances that they could not dispute the account.

LORD CHANCELLOR.—It comes out upon the account, that a sum of money will be to be refunded to the plaintiffs, and therefore the defendants have reheard this cause as to that part of the decree. I am not satisfied that this decree is wrong, either in point of law or equity.

March 10th,
1738.

It is said that the bonds discharged are a distinct security, and therefore that the matter is at an end.

If this were a separate independent transaction from the other bonds, then that would be true; but the note or agree-

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ment in 1710, makes all the bonds one entire transaction, and one usurious contract in equity.

For he was not content with the interest reserved on the bonds themselves, but afterwards when he found the *Cottons* in distress for money, obtained this note from them, whereby he was to be allowed 10*l. per cent.* on the whole sum, secured by all the bonds till it was paid.

Therefore I must consider it as one entire loan at 10*l. per cent.*, and the agreement extended to the subsequent bonds, and accordingly 10*l. per cent.* interest has been paid on a subsequent bond.

The receipts given are likewise for money due on all the bonds.

The argument therefore of its being an independent transaction falls to the ground.

There is nothing in this decree which contradicts the cases cited at law, nor is it necessary for me to determine how the Court would decree if the whole sum, with all the interest after the rate of 10*l. per cent.* had been paid, and all the cases cited go to that point only.

So was the case of *Tomkins and Barnet by Treby*, the case upon which Lord *Treby* founds his judgment, because there he who paid the money was *particeps criminis*, and the law would punish both equally. But that is not the case of one who borrows money at usury, the penalty by statute is only on the lender.

But I have no occasion to determine that point, and as to the objection that the law by permitting the party who borrows to be evidence after money paid in an information on the statute has consequently determined that there shall be no refundment; that holds only where all the money and usurious interest has been paid as contracted for; and there is no case where it has been determined that he might be evidence where only the principal sum and legal interest has been paid.

Besides the verdict in the criminal proceeding could not be given in evidence on an action to recover the money paid, and that because the party himself may be evidence in the criminal proceeding.

In this case it is not pretended that all the money, with the usurious interest too has been paid, and here is a ground to found the jurisdiction of the Court; the account and relief against the penalties, which would not hold, in case the whole was discharged.

The jurisdiction of this Court being therefore founded, the Court must do complete justice, and let the party have no more than is his due in conscience, and therefore it is like the case of bargains with young heirs, and in many of those cases, there has been express usury, and yet the Court has decreed accounts and refundments.

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But this case differs likewise from the usurious cases cited at law.

For here the bonds were not originally usurious but good, and made usurious by the subsequent agreement, and therefore if an action had been brought on them, the statute could not have been pleaded to them, or to the subsequent bonds.

Oppression therefore arises singly upon the note, and therefore the case comes out that there has been money paid as interest on bonds, which is not due on the bonds, but paid in pursuance of a void agreement only.

The nature of this case shews distress on one hand, and oppression on the other, and therefore comes directly to the case of young heirs.

Decree affirmed.

JOHN HOPKINS late DARE Plaintiff; (1)
 and
 JOHN HOPKINS, SARAH and his four }
 other Daughters and Others } Defendants.

March 5th and 12th, 1738—9.

J. H., by his will, devises his real estate to trustees and

JOHN HOPKINS, the testator, makes his will, dated 10th of November, 1729, in the following words:—

their heirs, to the use of them and their heirs, upon trust for *Samuel Hopkins*, only son of *John Hopkins*, for life, and after his decease, in trust for the first and other sons of his body successively in tail male, and in default of such issue, in case *John Hopkins* should have any other son or sons of his body, then in trust for all and every such other son and sons respectively and successively, for life, with like remainders to their several sons, as are limited to the issue male of *Samuel Hopkins*, and for default of such issue, then in trust for the first and every other son of *Sarah*, the eldest daughter of *John Hopkins*, successively for life, with remainder to the heirs male of their respective bodies, with similar limitations to the sons of three other daughters of *John Hopkins*, or to the sons of any other daughters which he might afterwards have born, and for default of such issue, in trust for the first and every other son of *Hannah Dare*, successively and respectively for life, with like remainders to the heirs male of every such son, and after other remainders, with the ultimate remainders in trust for his own right heirs; and the testator declared that none of the persons to whom his estates were limited for life, should be in the actual possession thereof, and in the enjoyment of the rents and profits of any other part thereof, than is provided by his will, until they should have respectively attained their ages of twenty-one years, and in the mean time his trustees and their heirs and executors, were to make allowances for their maintenance and education, and the overplus of the rents and profits above such allowances, and after payment of his debts and legacies, should go to such person as should be entitled to or come into the actual possession of his real estate; and the testator gave to *James Hopkins*, one of the trustees, an annuity of 300*l.* until some person under his will should come into the actual possession of his real estate by attaining his age of twenty-one years, and the rest and residue of his personal estate, after payment of his debts and legacies, he gave to his executors in trust, to be laid out in the purchase of lands, to be conveyed to his executors upon the same trusts as he had declared concerning his real estate; *Samuel Hopkins* having died in the lifetime of the testator, and *John Hopkins* since the death of the testator having had *William*, another son born, who had died, and there being no issue male of *John Hopkins*, or of any of his daughters, the plaintiff *John Hopkins*, late *Dare*, brought his bill claiming to be entitled to the estates devised, and to be purchased with the surplus of the personalty as tenant in tail male; held that there was a sufficient estate in the trustees to support the contingent remainders to the male issue of *John Hopkins*, and of his daughters living at the testator's death, and that the plaintiff was not entitled to the relief sought by his bill.

“As to such temporal estate as it hath pleased God to intrust me with, I give and dispose thereof as follows. I will that all the just debts which I may happen to owe at the time of my decease, and my funeral charges be thereout in the first place paid and discharged.

Item. All that my farms and lands called *New Place Farm*, now in the occupation of (the defendant) *John Hopkins*,

(1) The will is taken from the papers in the cause. The statement of the case, and the arguments of counsel from Lord *Hardwicke's* Note-book, and the judgment verbatim from a manuscript in Lord *Hardwicke's* handwriting.

the son of my late uncle *Samuel Hopkins*, deceased, and let to him at the yearly rent of 100*l*. I give and devise to my said cousin *John Hopkins*, for his life, and from and after his decease, I give and devise the same to *Elizabeth*, his wife, for her life, and from and after the decease of the survivor of them, I give and devise the same to my trustees and executors hereinafter named, and to their heirs and assigns, upon the trusts and for the purposes hereinafter limited and declared, touching the residue of my real estate, and as to all other my real estate whereof or whereunto I or any person or persons in trust for me or to my use, am is or are seised or intitled in possession, reversion or remainder, or otherwise howsoever, situate lying and being in the several counties in the will mentioned, I give and devise the same to my trustees and their heirs, to the use of them and their heirs upon the several trusts, and to the several purposes hereinafter mentioned and declared, (that is to say) upon trust for *Samuel Hopkins*, only son of my said cousin (the defendant) *John Hopkins*, for his life, and from and after his decease in trust for the first and every other son of the body of the said *Samuel*, lawfully to be begotten successively, and according to priority of birth, and the heirs male of the body of every such son respectively and successively, the elder and the heirs male of his body to take before the younger and the heirs male of his body issuing, and for want of such issue, in case my said cousin *John Hopkins*, shall have any other son or sons of his body lawfully begotten, then in trust for all and every such other son and sons respectively and successively, for their respective lives, with the like remainders to their several sons successively and respectively, as are therein before limited to the issue male of the said *Samuel Hopkins*, the son of the said *John Hopkins*, and for default of such issue, then in trust for the first and every other son of the body of *Sarah*, the eldest daughter of my said cousin *John Hopkins*, lawfully to be begotten successively and respectively, and according to priority of birth, for their respective lives, with remainders to the heirs male of the body of every such son respectively and successively the elder and the heirs male of his body, to take before the younger, and the heirs male of his body issuing.

The will then contained similar limitations to the sons of *Mary*, *Elizabeth* and *Hannah*, the three other daughters of *John Hopkins*, and to the sons of any other daughter which he might afterwards have born, and for default of such issue,

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then in trust for the first and every other son of his cousin *Hannah Dare*, daughter of his said uncle *Samuel Hopkins*, deceased, successively and respectively, according to priority of birth, for their respective lives, with the like remainders to the heirs male of the body of every such son respectively and successively the elder and the heirs male of his body to take before the younger and the heirs male of his body issuing, and for want of such issue, then in trust for *James Bennett*, the only son of another daughter of his said uncle *Samuel Hopkins* deceased, for his the said *James Bennett's* life, with remainder to his first and every other son lawfully to be begotten successively, according to priority of birth, and the heirs male of every such son respectively and successively, the elder, and the heirs male of his body to take before the younger and the heirs male of his body issuing, and in default of such issue, then in trust for his own right heirs for ever. And the testator thereby provided, that in case the said estates should at any time thereafter by virtue of the limitations thereinbefore contained descend or come to any person or persons who should not bear the name of *Hopkins*, then all and every such person or persons as soon as they should respectively come into, and be in possession of the premises by virtue of the limitations aforesaid, should assume and take his surname, and coat of arms, and in case any such person or persons neglect or refuse to assume his surname and arms, then it was his will that the said estates should not go or descend to any such person or persons so neglecting or refusing; but every such person should be considered as if naturally dead, and in every such case the said estates should go and descend to the next person in succession, according to the limitations aforesaid, and the will contained the following proviso: "provided also, that none of the persons to whom the said estates are hereby limited for life, shall be in the actual possession thereof, and in the enjoyment of the rents and profits, or of any greater or other part thereof than as hereinafter is mentioned, until he or they shall have respectively attained his or their age or ages of twenty-one years, and in the mean time until his or their severally attaining to such age, my said trustees, and their heirs or executors shall make such allowances thereout for the handsome and liberal maintenance and education of such person or persons respectively, as they shall think suitable and agreeable to his estate and fortune, and it is my will that the overplus of the said rents and profits over and above the said annual allow-

ances, or of such part thereof as shall remain after all my debts, legacies, and funeral expences shall be first paid, with the payment whereof I have charged my real estate, in case my personal estate shall not be fully sufficient for those purposes, do go to such person as shall first be entitled unto or come into the actual possession of my said real estate, according to this my will."

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The testator then gave several pecuniary legacies, and appointed Sir *Richard Hopkins*, *John Rudge*, and *James Hopkins*, joint executors of his will, and gave to the said *James Hopkins* 500*l.* in money, and 20*l.* for mourning, and also an annuity of 300*l.* to commence from his death, and to be continued and paid to him half yearly, until some person under his will should come into the actual possession of his real estate by attaining his age of twenty-one years, if the said *James Hopkins* should so long live, and continue to act in the said trust, and in case the said estate should so come into possession in a less number of years than ten years after his decease, then he willed that the annuity of 300*l.* should be continued and paid to the said *James Hopkins*, for so long after the said estate should so come into possession, as with the time he should before have received the said annuity, would make up the whole time of his receiving thereof ten years, if the said *James Hopkins* should so long live; and he declared his will to be, that if his personal estate should prove deficient fully to answer and pay all his debts, funeral charges, and the legacies and annuities thereby by him given, that then such deficiency should be made good out of his real estate, or the rents and profits thereof; and all the rest and residue of his personal estate, in case there should be any such after the payment of his debts, funerals, legacies, and annuities, he gave to his executors in trust for the same, to be by them or the survivors or survivor of them with all convenient speed, laid out in the purchase of messuages, lands, and tenements of inheritance in the kingdom of England, to be conveyed to his said executors and their heirs upon the same trusts, and for the same purposes as were thereby declared, touching the estates he was then seised of, and which he had thereby devised.

Samuel, the son of the defendant *John Hopkins*, died in the testator's lifetime, on the 25th of April, 1732. The testator died, leaving the defendant *John Hopkins*, his heir at law.

Upon the testator's death, two bills were filed, the one

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by the defendant *John Hopkins* and his daughters, in which he claimed as heir at law to be entitled to the profits of the estates until some person should come in *esse* capable of taking by the will; and the other by the trustees, praying that the profits might be laid out and accumulated to increase the estate.

In both these causes the present plaintiff was a party defendant.

Both causes came on to be heard together before the then *Master of the Rolls*, on the 25th of October, 1733; when his Honour declared that the plaintiff, *John Hopkins*, being the testator's heir at law, was entitled to the profits of his real estate, devised to the trustees, upon the trusts of the said testator's will accrued due since the said testator's death, until some person should come in being who should be entitled to an estate for life according to the limitations in the will, and that he was in like manner entitled to the surplus produce of the testator's personal estate after payment of the annual sums charged thereon, and decreed accordingly.

This decree was affirmed upon appeal by the Lord Chancellor *Talbot* on the 18th of November, 1734, with this addition, that the words "in possession" should be inserted next after the clause "until some person should come in being who should be entitled to an estate for life."

On the 18th of June, 1736, the defendant, *John Hopkins*, had another son born named *William*, who died on the 24th of December in the same year.

Upon his death, there being no issue male of *John Hopkins*, or of any of his daughters, the plaintiff, the eldest son of the testator's cousin, *Hannah Dare*, being of the age of twenty-one years, assumed the name of *Hopkins*, in pursuance of a direction in the testator's will, that every person not of that name who should come into possession of the premises thereby devised, should take the name of *Hopkins*, and brought the present suit claiming to be entitled to the estates devised, and to be purchased with the surplus of the personalty, as tenant in tail male, and therefore praying that the real estates devised might be conveyed to him in tail male, and that the surplus of the personal estate might be paid to him, or laid out in the purchase of lands in pursuance of the directions in the will.

Mr. *Chute*, Mr. *Noel*, Mr. *Green*, and Mr. *Murray*, for the plaintiff.

The *Master of the Rolls* was of opinion, that by the death

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of *Samuel* in the lifetime of the testator, all the subsequent estates became executory, in support of which *Pag's* case, Cro. El. 828. (1) was relied upon; but upon the birth of *William*, admitting that the devise to an unborn son of *John Hopkins* was good as an executory devise, an estate of freehold vested in him, and thereupon all the subsequent limitations became remainders, and the remainder to the eldest son of *Hannah Dare* is the first vested remainder. If *Samuel* had lived, he would have taken an estate for life, and *William* took the same estate which *Samuel* would have taken. A devise cannot be vested as to the particular estate and remain executory as to the limitations, expectant upon it; therefore, there can be no executory devise where the freehold does not descend in the mean time; but in this case the freehold has once been vested; the moment a son of *John Hopkins* was born, there was an end of the right of the heir at law to the rents and profits.

It is objected, that by force of the proviso as to the actual possession, no estate vested in *William*, the infant, before he attained the age of twenty-one years, but the devise to him operated as a disposition of the estate, and the proviso only imposed a restraint as to the enjoyment of the profits, the object being to appoint a kind of guardian, *Taylor v. Biddall*, 2 Mod. 289. and the direction is that the surplus rents and profits shall be laid up for such person as shall come into actual possession; nothing therefore was left undisposed of for the heir at law.

It is said that this is a trust executory, and to be moulded by a Court of Equity; but this Court always governs itself by the rules of law as to the vesting of estates in the first taker, although it has gone further in construing the extent of interest which he is to take. In *Papillon v. Voice*, 2 P. Wms. 471. the only question was as to the nature of the estate and interest. In *Bale v. Coleman*, 1 P. Wms. 142. Lord *Harcourt* held that in wills the devise of a trust must be taken according to the legal effect of the words, and in the case of *Howard v. the Duke of Norfolk*, 3 Ca. in Ch. 1. the Court disclaimed any authority to set up a different rule of property from that which prevails at law.

It is objected, that the plaintiff having been a party to the former suit, is bound by that decree in that cause, and that by the words introduced therein by Lord *Talbot*, the defend-

(1) See this case differently reported, Noy. 43.

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ant, *John Hopkins*, is entitled to the rents and profits, until some person shall come *in esse* who will be entitled to an estate for life in possession; but the object of those words was to prevent *John Hopkins* from being turned out of possession by some of his daughters having a son, who might himself be disappointed by *John Hopkins* having a second son.

If these subsequent limitations cannot take effect as executory devises, neither can they be good as contingent remainders, because they are not to come *in esse*, within that compass of time which the law allows; and there is no estate to support them, the legal estate in the trustees is clearly not sufficient for that purpose, being of a totally different nature. This Court applies the same rules to equitable estates which Courts of law do to legal estates, and a contingent remainder of a trust estate requires a particular estate to support it as much as a legal estate.

Mr. Attorney-General, Mr. Browne, Mr. Fazakerley, and Mr. Clarke, for the defendant *John Hopkins* and his daughters.

There are two things to be considered distinctly,

1st. As to the legal estate devised by the will.

2dly. As to the personal estate given to be laid out in land.

As to the first there are two points:

1st. What was the testator's intention.

2dly. What objections there are to that intention being carried into effect.

As to the intention nothing can be more plain than that the testator intended that the issue of *John Hopkins* should take before the plaintiff, or any who may claim under the subsequent limitations; but,

2dly. It is said that this limitation cannot take effect; because

1st, That the limitations after that to *William Hopkins* are to be considered as contingent remainders, and that there are no trustees to preserve them, and,

2dly, That these contingent remainders are not good in law, being remainders after limitations to persons not *in esse*.

3dly. That these limitations if to be considered as executory devises are too remote.

It is contended that though the limitation to the second son of *John Hopkins* was declared to be an executory devise; yet that upon its taking effect all the subsequent limitations became remainders. It may be, that when a legal estate is once vested, all the subsequent estates are to be considered as contingent remainders, though

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where necessity requires it, it may be otherwise ; but this case turns upon the estate being a trust estate, and it may be considered upon the ground of the trust having been executed by the birth of *William*, and of all the subsequent limitations having been thereby turned into remainders. The question is the same as if *Samuel* had survived the testator. We admit that an estate of freehold vested in *William* notwithstanding the proviso postponing the actual possession till the age of twenty-one.

Two points were made before Lord *Talbot*.

1st, That the limitations were executory devises.

2dly, That if contingent remainders, the legal estate vested in the trustees was sufficient to support them. His Lordship having decided in favour of the first proposition, gave no opinion upon the 2d point ; but in a subsequent case he held that a general legal estate in trustees, without any particular limitations was sufficient to support contingent remainders ; *Chapman v. Blissett*, Ca. Temp. Talb. 145. which has since been affirmed by your Lordship. In the general case a trust might have been declared to preserve the contingent remainders, but the trust actually vested in the trustees amounts to the same thing. The testator clearly intended that the estate given to them should support all the limitations.

The testator knew that he had created contingent remainders, and gave the estate to the executors for all the purposes of the will ; any estate of freehold, though no particular trust be declared, will be sufficient to support contingent remainders. In *Salter's case*, Yelv. 9. 10. though the rent ceased by the death of the tenant for life, yet the estate being held by the terretenant, though discharged of the rent, was decided to be sufficient to support the remainder. The system of introducing trustees to preserve contingent remainders was adopted because the law required that the freehold should be in some person who might be tenant to the *præcipe*, but in the present case, the trustees have the freehold, and can answer both in law and equity.

It is said that this Court will never support the limitations of a trust, which if it had been of a legal estate would have been void ; but the trusts of a term may be limited by deed, otherwise than the term itself, *Chalfont v. Okey*, 1 Ch. Cas. 329. The rule of conveying trust estates has never followed the rule of conveying legal estates. If *William* had attained the age of twenty-one, and had brought a bill to have a conveyance, the Court would have directed the estate to be

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conveyed so as to preserve the contingent remainders, *Mas-senburgh v. Ash*, 1 Vern. 234.; but now the Court is not asked to give to trustees a legal estate which they have not, but to use a legal estate which they have. The Court is desired to do no more than the testator might have done by strict legal rules. In *Carrick v. Errington*, 2 P. Wms. 361. 3 Bro. P. C. 412., there happened to be a chasm in the trust, and the Court gave the profits in the interim to the heir at law as undisposed of.

We admit that the subsequent limitations to the sons of sons unborn are bad, but that will not affect the present question. They may be altogether struck out, or may more properly be considered as creating estates tail, *Humberston v. Humberston*, 1 P. Wms. 332. As to the limitations being void as executory devises, if they are so with regard to us, they must be equally so with regard to the plaintiff.

The remaining point, as to the personal estate, is free from most of the difficulties to which the other parts of the case are subject. It is a mere executory trust which the Court will execute, as near to the intention of the testator as possible, and if necessary will direct trustees to be interposed, *Hobart v. Stamford*, 1 Bro. P. C. 288. *Humberston v. Humberston*, and *Sandys v. Dixwell*, lately decided. (1)

Reply.

It was not decided in *Chapman v. Blisset*, that trustees of the whole legal estate were sufficient to support contingent remainders, for in that case the limitation was good as an executory devise, there being no immediate estate for life given to any person *in esse*. We contend that a general legal estate is not sufficient to support contingent remainders limited of the trust of such estate; but, independently of that, it would not have been possible in the present case to have interposed trustees in a conveyance, so as to have preserved these contingent remainders. That *William Hopkins* would have been tenant for life, and not tenant in tail, cannot be disputed; it is so expressed in the will, assumed in the proviso, and understood in the decree. How then could these remainders have been preserved during all the lives of all the unborn sons and daughters of *John Hopkins*? The plans suggested would tie up the estate for one generation longer than the rules of law admit.

March 12th,
1738.

LORD CHANCELLOR, after stating the case, gave the following judgment:—

(1) See ante page 536.

Two bills brought in this Court, one by defendant *John Hopkins* and his daughters, for an account of the testator's estate, and an execution of the trusts of the will.

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By this bill Mr. *J. Hopkins* prayed, that he might have the profits, till some person came *in esse* capable of taking by the will, as part of the trust undisposed.

The other bill, by the trustees, to have the profits laid up and accumulated to increase the estate.

These causes came on to be heard, before the late *Master of the Rolls*, 25th of October, 1733; on that hearing a very considerable question arose.

It was admitted on all hands, that if *Samuel Hopkins* had survived the testator, he would have taken an estate for life in the trust in possession, and that all the subsequent limitations, intermediate between the devise to him and the devise to the now plaintiff, the first son of *Hannah Dare*, would have been contingent remainders; but it was insisted for the plaintiffs, in the original cause, that by the death of *Samuel Hopkins* in the testator's lifetime, the devise was become void, and consequently should be considered as not written in the will; that if the subsequent limitations could not take effect as contingent remainders, that they might notwithstanding as an executory devise, and that they should take effect as they could, *ut res magis valeat*, and that the intention of the testator might be fulfilled.

On the side of the now plaintiff, who was then a defendant, it was insisted, that by the death of *Samuel Hopkins*, the estate of freehold devised to him in the trust becoming void, and never taking effect, the contingent remainders dependent upon it were become void, and that the law would not admit that a limitation, which in its original creation was a contingent remainder, should by an accident happening, one way or the other, be turned into an executory devise.

The opinion of the *Master of the Rolls* upon that point, affirmed by Lord *Talbot*, is not now to be disputed, and indeed the plaintiff founds his present bill upon it, but since the making of that decree, two events have happened which have given occasion to the present suit. On the 18th of June, 1736, *John Hopkins* had a second son born named *William*, and on the 24th of December, 1736, that son died aged about six months and one week.

Upon his death, the plaintiff, who has attained his age of twenty-one years, has brought the present bill to have a settlement of the trust estate made by the trustees, and to

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have the first estate made therein limited to himself in possession, and to have an account of the profits during the life of *William*, the infant, and the surplus profits paid to himself. Whether he is entitled to such an immediate conveyance or not, will depend upon the determination of the points insisted upon on both sides?

On the part of the plaintiff it has been contended, that by the birth of *William*, the infant, the estate became vested in him, and was no longer executory, and that consequently all the limitations subsequent thereto became remainders, either contingent or vested, according to the nature of the respective limitations, and as the persons to take were *in esse* or not. That such of them as were contingent, not having become vested, either during the continuance or at the instant of the determination of the particular estate were fallen and void, and can now never take effect, and that from thence it follows, that the plaintiff is entitled to the estate in possession, as having the first remainder vested.

On the part of the defendant, this has been endeavoured to be answered three ways :

1st, That there is no necessity for considering the limitations subsequent to the second son of *John Hopkins*, as contingent remainders, but that they may subsist as so many distinct executory devises, and that in default of one taking effect the other shall.

2dly, Another answer, and that which was relied upon, was that, admitting that by the vesting of the estate in the infant, *William Hopkins*, the subsequent limitations were now to be looked upon as contingent remainders, yet that they are not now destroyed by not vesting during his life, but that the legal estate in the trustees is sufficient to support them.

3dly, That a determinable freehold in the trust is descended to the heir at law, and that is sufficient to support the contingent remainders of a trust estate.

These points have been well argued at the bar, and some things, I think, are clear.

1st, That if these had been contingent remainders of a legal estate, or a use executed by the statute 27 Hen. 8. and no trustees inserted to preserve contingent remainders, they would have been void.

2dly, I think it is clear that these subsequent contingent limitations cannot be supported as so many distinct executory devises.

Even the case of *Higgins v. Derby*, (1) before Lord Cowper, Mich. Vac. 6 Anne, hinted at by Mr. Attorney-General, did not go so far as that upon the limitation of the trust of a term; the utmost that was said was, that where the limitation to the son and the heirs male of his body never took effect by there never being a son, the limitation over to the daughters might possibly be good; but here the trust estates vested in *William*, the infant, at least for life; that was capable of supporting a remainder, and consequently according to the doctrine in the case of *Purefoy v. Rogers*, 2 Saund. 380. all the subsequent limitations must be considered as remainders; (2) and in truth they were so many parts of the same executory devise, and when that once became vested in the first taker, it could be no longer executory.

The case then is brought to this question, and I think was in effect admitted to be so by the counsel for the defendants, whether the legal estate vesting in the trustees will support these remainders.

Before I proceed to consider this, I would observe, that it is not necessary to bar the plaintiff from having an immediate conveyance, that all the contingent limitations intervening between the estate limited to *Samuel Hopkins*, and that to the plaintiff, should be good subsisting contingent remainders; it is sufficient if some of them are good, for then so long as they continue, the plaintiff cannot be let in.

Samuel Hopkins, should be good subsisting contingent remainders. It is sufficient if

Not necessary to bar the plaintiff that all the contingent limitations intervening between him and the estate limited to *Samuel Hopkins* some are good.

Upon considering this question, I am of opinion that the legal estate in the trustees is sufficient to support some at least of these contingent remainders. For this I go upon two grounds:—

First. The plain intention of the testator, as declared by his will.

Secondly. That this intention is consistent with the rules of law, and the common principles of equity.

First. As to the intention of the testator, the plaintiff comes before the Court in a very unfavourable light, claiming under the will and bounty of the testator, and at the same time endeavouring to defeat it. This indeed has been

Legal estate in trust is sufficient to support contingent remainders. (3)

(1) 1 Salk. 156.

763. *Ives v. Legge*, in note, 3 T. R.

(2) *Reeve v. Long*, Skin. 431.

488.

Carth. 310. 4 Mod. 282. S. C.

Nealtby v. Bosville, Reps. temp.

(3) So *Chapman v. Blisset*, ante p.

Hardwicke 258. *Walter v. Drew*,

328. *Robinson v. Robinson*, 2 Ves.

Com. 372. *Doe v. Morgan*, 3 T. R.

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retorted on the defendant, the heir at law; but the case of the heir at law is very different, for he does not claim by the will or intention of the testator, but only asks what is not given from him. The testator could not have framed his will so that nobody should take any part of his estate; if it could have been done, it would have been as likely to have happened in this case as in any.

But to consider and apply the testator's intention to this point. [(1) He devises his real estate to trustees and their heirs, to the use of them and their heirs, so that it is a clear use executed by the statute, upon the several trusts, and to the several purposes thereafter mentioned and declared; these words were properly and strongly relied upon for the defendant, as declaring his intention that the legal estate so given should be used to serve and support all the trusts and limitations after declared; he then proceeds to limit the trusts, and when he comes to the after born sons of *John Hopkins*, he says, "In case my said cousin *John Hopkins* shall have any other son or sons, then in trust for all and every such other son and sons respectively for their lives, with the like remainders to their several sons as are hereinbefore limited to the issue male of *Samuel Hopkins*, son of the said *John Hopkins*; so that he expressly declares that they should be trustees for such after born sons, and consequently the Court is to make a construction to support it in such manner as they can.] But though this was his actual intention, if it is contrary to the rules of law and equity, it must be overruled and rejected.

Let us therefore consider in the second place, whether it is consistent with the rules of law, and the common principles of equity.

The great objection to this has been, that by law a contingent remainder must vest during the continuance of the particular estate, or *eo instanti*, that it determines, or else it is destroyed, according to *Archer's* case, and all the authorities. That the only method found out to avoid this, since the resolution in *Chudleigh's* case, has been to create a particular estate of freehold, and vest it in trustees, to support the contingent remainder; and that there is no such limitation in this case; and that it is the maxim of this

(1) This part of the judgment within brackets is taken from another manuscript; in Lord *Hardwicke's* manuscript there appears only the following words: "state the several expressions in the will material to this purpose."

Court that trust estates, which are the creatures of equity, shall be governed by the same rules as legal estates, in order to preserve the uniform rule of property; and that the owner of the trust shall have the same power over the trust as he would have had if he had the legal estate for the like interest or extent.

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This is undoubtedly true in general, but it affords no just conclusion to the present case, and that for three reasons:

First, Because the ground and foundation which the common law goes upon, in making a contingent remainder void in such a case, does not hold in the case of a trust.

Secondly, Because to allow of this, will not affect or restrain any rightful power of alienation in the *cestui que trust*, which the law allows to the owner of a legal estate, and consequently does not tend to a perpetuity.

Thirdly, Because to require a more distinct limitation to support the contingent remainders in such a case of a mere trust would be wholly vain and nugatory.

1. As to the first of these reasons; the ground upon which the common law requires a contingent remainder to vest either during the continuance of the particular estate, or *eo instanti*, that it determines, is that a freehold cannot be in abeyance; there must be a tenant of the freehold to perform the services due in respect of the land, and to answer in a *præcipe*, and to all writs to be brought concerning the realty, otherwise there would be a failure of justice.

The ground upon which the common law requires that a contingent remainder must vest, during the continuance of the particular estate, or *eo instanti*, that it determines, is

that a freehold cannot be in abeyance, because there must be a tenant to perform the services, and to answer in a *præcipe* to all writs, does not apply to the case of a trust estate; as the trustee is tenant of the freehold to perform services, &c.

But this cannot hold in the case of a trust or equitable estate. The trustee is tenant of the freehold liable to perform all services, to answer to all *præcipes*, and though a similar mischief was endeavoured to be shewn in equity from the want of a proper person to answer to demands and to be bound by decrees here, that consequence will not follow; for let there be ever so many limitations in contingency upon the trust it is sufficient to bring the trustees before the Court together with the first person who has a remainder of inheritance vested, and the estate itself, and all parties that may hereafter become interested will be bound by the decree unless there be fraud or collusion.

Where there are ever so many contingent limitations, sufficient to bring the trustees before the Court, and the first person who has a remainder of inheritance vested.

There is a very great opinion, that this maxim of the common law, that there must be a tenant of the freehold, was never drawn over and applied to the case of uses before the statute, 27 Hen. 8., whilst they remained mere trusts.

HOPKINS It is laid down by Mr. Justice *Gawdy*, in *Chudleigh's case*,
 v. I Co. 135 a., that before the statute, if a man had made a
 HOPKINS. feoffment to the use of one for years, and afterwards to the
 use of the right heirs of *J. S.* who was then living, this li-
 mitation had been good, for the feoffees remained tenants
 of the freehold; but such a limitation after the statute is
 void.

This is a plain authority that the freehold in the feoffees to uses before the statute, who were then mere trustees was sufficient to support the contingent remainder of the trust. (1)

2ndly. My second reason is, that to allow of this, will not affect or restrain any rightful power of alienation in the *cestui que trust*, which the law allows to the owner of a legal estate, and consequently will not tend to a perpetuity. If this were otherwise it would create a very considerable objection indeed.

Before the statute 27 Hen. 8. the judges and sages of the common law gave uses very hard names, and called them the product of fraud, and subversive of the rules of real property.

To remedy these mischiefs the statute was made to execute and bring the estate to the use that after the statute the *cestui que use* might be seised of the estate at law in like manner as before the statute he was of the use in equity.

The object of the statute was that the *cestui que use* might be seised of the estate at law in the same manner as before the statute he was of the use in equity, but the necessities of mankind compelled the judges to give way to such limitations of uses as were foreign to the notions of the common law.

This the judges at first professed to adhere to, but notwithstanding that, the necessities of mankind, the reasonable occasions of families to make use of their estates compelled them in a little while to give way to such limitations of uses as would by no means be admitted of a common law fee. Future contingent uses, springing uses, executory devises, powers over uses, all foreign to the notions of common law were let in by the construction of the judges them-

(1) Note in Lord *Hardwicke's* handwriting, 1 Williams, 56. In the case of *Bampfild v. Popham*, it is said that *Trevor, C. J.*, in his argument cited a case of *Penhay con. Hurrall*, in Cane, 1699, wherein it was held that if there be *cestui que*

trust for life remainder to his first and other sons in contingency, that *cestui que trust* for life cannot destroy the contingent remainders. This is in point, but at the time of my delivering this opinion that book was not published.

selves; but still they adhered to their doctrine that there could be no such thing as a use upon a use, but where the first use was declared to any person there it was executed and must vest for that estate.

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Therefore if a man limited land to *A.* and his heirs, to the use of *B.* and his heirs in trust, for or to the use of *C.* and his heirs, the use was executed in *B.* *B.* had the estate by the statute and *C.* could take nothing.

Of this construction courts of equity laid hold, and said however, the intention of the party was to be supported; it was plain *B.* was designed to take no benefit to himself; the conscience of *B.* was affected, and it was still a trust in equity to be executed by *subpæna.* To this the reason of mankind assented, and it has stood ever since. So that a statute thus solemnly and pompously introduced, has by this strict construction to avoid a use upon a use at law been reduced to have no other effect, but to add two or three words at most to a conveyance.

It is true this could not have been endured, if courts of equity had not in general allowed those trust estates to have the same consequences in point of property with legal estates, and given the owner of the trust in equity the like power of alienation over the trust estate, as he would have had over the use if it had been an use executed by the statute.

Owner of a trust in equity same power of alienation as if it were an use executed.

Therefore tenant in tail of a trust may bar the issue by fine.

Tenant in tail of a trust, with remainders over, may dock those remainders by common recovery; (1) nay, some have gone further, and said by bargain and sale enrolled. (2)

All these are common assurances, and rightful methods of conveyancing.

But it has never yet been allowed, that in a trust estate, the like estates may be gained or transferred by wrong, as might be by the common law of the legal estate:

Therefore upon a trust in equity, no estate can be gained by disseisin, abatement, or intrusion. It is true there may be a disseisin, abatement, or intrusion upon the trustee, and no estate can be gained by disseisin, abatement, or intrusion.

As between trustee and cestui que trust,

(1) *North v. Champernoona*, 2 Ch. Ca. 78. *Carpenter v. Carpenter*, 1 Vern. 440.

(2) *Carpenter v. Carpenter*, 1 Vern. 440. *Beverley v. Beverley*, 2 Vern. 133. *Contra, Legatt v. Sewell*, 2

Vern. 552., but now a recovery to bar equitable estates is necessary, *Radford v. Wilson*, 3 Atk. 815. *Kirkham v. Smith*, 1 Ves. 268. *Burnaby v. Griffin*, 3 Ves. 277. *Fletcher v. Tollet*, 5 Ves. 13.

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that may consequentially affect the *cestui que trust*, but that is as it affects and binds the legal estate; but of the mere trust or equitable interest, there can be no such thing whilst the trustee continues in possession of the land.

Destruction of contingent remainders by tenant for life, in law considered as a wrong without a remedy, but equity does not allow an estate to be gained in a trust by such means whilst the trustee continues in possession.

To apply these instances to this case the destruction of contingent remainders by the act of the tenant for life is considered in law as a wrong without a remedy, the law books call it a tortious act; and it is so strongly such, that it is a forfeiture of his own estate, and from that cause works the destruction of the remainder. Now, if equity has never yet suffered any other of the wrongful acts already mentioned, or any thing similar to them, to gain or transfer an estate in a trust, whilst the trustee continued in possession; what reason can be given why this should take place, or why the Court should strive to preserve this power to the *cestui que trust* for life, the execution whereof the law itself calls a wrong.

Many instances of mergers of legal estates, and yet courts of equity have never suffered mergers of trusts.

(1) [It is in this respect to be compared to the cases of merger, for though it is the doctrine of this Court, that the rules of property and convenience hold in the same manner with respect to trusts as to legal estates, to prevent perpetuities; yet in the cases of merger there are many instances where there would be mergers of legal estates, and yet courts of equity have never suffered mergers of trusts, where the legal estate continued in the trustees, but have been against the merger, if the justice of the case required it.]

Where the whole fee is in trustees to require a new limitation to support contingent remainders would be nugatory.

The third reason I relied upon was, that in the case of a mere trust where the whole fee is in the trustees, to require a new distinct limitation to support the contingent remainders, would be wholly vain and nugatory.

This is almost self-evident. Suppose the testator had in his will, after the limitations to *Samuel Hopkins* and his issue, gone on and said, remainder to *J. N.* and *J. S.*, and their heirs in trust to preserve contingent remainders, could *J. N.* and *J. S.*, have taken any estate either in law or equity?

It is plain they could not; not in law, use upon an use, not in equity, for the trustees first named having the whole fee, are trustees for all the *cestui que trusts* that can take

(1) This part of the judgment within brackets is taken from *Atkyns*; in Lord *Hardwicke's* manuscript the following words are only used "Cases of Merger."

under this will, and they must have the profits so far as it is disposed.

Suppose he had made this limitation to Sir *R. Hopkins, &c.* the first trustees, could they have taken any thing more? No, it would have been repetition and tautology; and they must have been in by the first devise of the fee simple.

The principal objection to this has been, that the legal estate in the trustees, and the equitable estate in the *cestui que trusts* are things entirely of different natures, and you cannot draw over and apply the one to support a contingent remainder of the other; and you might as well make use of the estate limited to trustees to uses executed by the statute to support a contingent remainder of the use, after the determination of the particular estate in the use.

Answer.—I admit the legal estate in the trustees is of a different nature.

But still it remains in them to serve and support all the trusts.

But upon the statute, it is quite otherwise.

The words are, “Every person that shall have any such use shall be seised of and adjudged to be in the lawful seisin and possession of the lands, to all intents, constructions and purposes of such, and the like estates as they might have had in the use; and that the estate that was in such person that should be seised to the use of another person shall from thenceforth be clearly adjudged to be in him or them that have such use.”

By the operation of these words, the legal estate is executed to the uses, and the *cestui que trust* has the legal estate limited just in the same manner as the use was to him.

The consequence of this is, that as to persons *in esse*, it vested and became executed immediately; as to persons not *in esse*, where the uses were contingent it vested as they came *in esse* provided they came *in esse*, in such time as the law required they should do to take the legal estate, for now it was become a legal estate.

If they did not come *in esse* in due time, the estate must go on immediately to the next remainder-man as it would have done if it had been a common law fee, for so the statute required.

Thus the Judges construed it in *Chudleigh's* case, and if the estate once goes over to any person by virtue of the deed or will so that he takes as a purchaser, it can never be drawn back again.

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Uses executed
by the statute
and mere trusts
different.

This shews that, as to this question there can be no reasoning from the cases of uses executed by the statute to the case of a mere trust not executed by the statute. They stand on different foundations.

These are the reasons which govern my judgment upon this point, and I own I can see no inconvenience from it.

It must be admitted that the testator might have done this, (I mean at least as to part of these remainders) if he had used proper words for it; and if he has clearly expressed his intention, this Court, which is to direct a settlement of his estates according to his intention, as far as it may stand with the rules of law, is to take the proper methods to supply the defect.

The authorities for this are very strong, *Sir John Hobart v. The Earl and Countess of Stamford* adjudged in this Court before *Lord Chancellor Cowper* the 19th of *December*, 1709.

[(1) Notwithstanding the distinction taken upon it, it is a strong authority for this purpose.

Serjeant *Maynard* "devised his estate to trustees, and their heirs, and declared after his wife's death, they should convey the estate to the uses of, and in trust for *Sir H. H.* for life, remainder to the first son for ninety-nine years, if he so long live, remainder to the heirs male of such first son, remainder to the Countess of *Stamford* for life, remainder, &c. A conveyance was directed according to the will, exceptions were taken to the draft of the conveyance; *Lord Cowper* declared, that where articles or a will were improper or informal, the Court was not to direct a conveyance according to such improper directions, but in a proper and legal manner, which might best answer the intention of the parties, and conceived the intention to be, that the estate should be secured so far as the rules of law will admit before cross-remainders should take place; and therefore ordered accordingly upon an appeal to the House of Lords, alledging that this was making a different settlement, the order was affirmed upon that principle, that a trust estate being in its nature executory, it is incumbent on the Court to follow the intention of the parties as far as the rules of law will admit."]

(1) This part of the judgment within brackets is taken from *Atkyns*, in *Lord Hardwicke's* manuscript, the following words are only used. "*Vide Case,*"

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Humberston v. Humberston, 25th January 1716, Reg. Lib. 1716. Lib. A. 529, (1) in this Court before Lord Chancellor *Cowper*; *Matthew Humberston* devised his real estate to the Draper's Company and their successors, in trust to convey it to the plaintiff for life only, and after his decease to his first, &c. sons for their lives only, and the issue male of their bodies successively for their lives only, and for want of such issue to fifty other persons of the name of *Humberston* for life only, with remainders to their several sons, and their issue male of such sons for their lives only successively.

A bill was brought in this Court for execution of the trusts, Lord *Cowper* of opinion that an attempt to make a perpetual succession of estates for life was vain and not practicable, but however there ought to be a strict settlement made, and the intention of the testator followed as far as the rules of law would admit, and decreed that the master do see a settlement made of the trust estate, pursuant to the will, with limitations to the several parties named to be tenants for life in the will, and to the heirs males of their bodies in strict settlement according to the course of law; and if any of the parties who are made tenants for life have any issue male living, their names are to be inserted in the deed of settlement.

The words in this decree—a *strict settlement according to the course of law*, necessarily import a direction to insert trustees to preserve contingent remainders.

The cases of *Sandys* and *Dixwell* (2) followed this, but as that is so lately determined and rests only on my own opinion, I don't mention it as an authority.

It may be observed on these cases that how improperly and inartificially soever a testator makes his will, this Court takes notice whether he intends a strict settlement, and will direct such a settlement, as far as the lawful methods of conveyancing will admit, although he might design or direct something further.

Objection.—Distinction taken between those cases and the present.

Those were executory trusts, where the will directed a conveyance.

Here no such directed, but an immediate trust executed, and declared by the will.

(1) 2 Vern. 737. 1 Eq. Ca. Ab. 207. (2) See *ante* page 536.
pl. 8. S. C. 1 P. Wms. 332. n. 1.

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Answer.—Such expression sometimes used, but seems a distinction almost without a difference.

All trusts not executed by the statute of Uses, are executory in this Court, and whether the will or deed expressly directs a conveyance, this Court must decree one, when assisted by proper parties at a proper time, according to the nature of the trust.

Plain intention
that this should
be an execu-
tory trust.

But allowing all the weight to this distinction that can be desired, here are plain declarations of the testator's intention that this should be an executory trust, and a strict legal conveyance be made in due time by his trustees.

Vide the will.—*Proviso as to the profits till any tenant for life attain the age of twenty-one.*

Clause giving the 300l. per annum to James Hopkins till some person comes into possession.

Clause as to the personal estate which is clearly executory, and directed to be laid out in lands, and the lands settled upon the same trusts, and to the same purposes.

Legal estate in
trustees will
support contin-
gent remain-
ders where no
conveyance is
directed.

But be this point as it may, the case of *Chapman and Blisset*, decreed by Lord *Tulbot*, 24th November, 1736, is a clear authority, that the legal estate in the trustees will support the contingent remainders even of a trust declared by a will, where no conveyance was expressly directed.

(1) [The case was, *J. Blisset*, “after several directions “and charges upon his real estate, devised all other his “real estates to trustees and their heirs, in trust to pay “his son *J. B.* quarterly 37l. 10s. during his life, and if “there were any child or children, he gave the rest and “residue of his real estate for the education and benefit “of such child or children, and if his son married with “such consent as the will mentions, 100l. per annum to his “wife; if without, 10l. per annum, and after his said “son’s decease, gave one moiety of the said trust estate to “such child or children, their respective heirs, executors, “and assigns, the survivor of them, &c. and the other “moiety to the child or children of *Joseph*, &c. and if *J. B.* “died without issue, to such child, &c. of my daughter, &c. “with a remainder over; the testator dies; *J. B.* marries, “and has a son, then died; *Joseph*, who was the testator’s “grandson, had no son born at the time of the death of “*J. B.* but had a son four years after, and upon this a bill

(1) This part of the judgment within brackets is taken from *Atkins*; in Lord *Hardwicke’s* manuscript the following

words are only used, “Vide the case “of *Chapman and Blisset*, and state “it.”

“ was brought by the heir at law, insisting that these limitations were void, particularly as to the son of *Joseph*, “ not being born till four years after the death of *J. B.*”

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The first question was, whether it was to be considered as a legal estate subsisting in the trustees, or whether it was not a use executed by the statute? Lord *Talbot*, and myself on a rehearing, were of opinion, “ that the legal estate “ in fee was in the trustees, and all the limitations, in the “ subsequent interest, were trusts.”

The next question was, whether the limitation to the son of *Joseph* was good? and if so, whether as an executory devise or a contingent remainder? Lord *Talbot* “ was of opinion, that it might be good even as an executory devise, “ in a legal limitation, and the only objection was, that the “ limitation was *in verba de præsenti*: but he said the words “ were to be considered as the testator meant them, that he “ knew *Joseph* was an infant and young, and devising a “ moiety to his child, knowing he had none, must necessarily intend it future, and therefore it was impossible to “ shew an intention more clearly of children thereafter to be “ born. But he went on, that when *J. B.* had a child born, “ that had a freehold in the trust during the life of *J. B.*, “ whether, after that, it was to be considered as an executory devise, or a contingent remainder, the child of *J. B.* “ having a kind of freehold in the trust itself? He held, that “ if taken as a remainder, in case of a limitation of legal estate, it was clearly void, for the freehold would be in abeyance for four years, between the death of the son of *J. B.* “ and the birth of the son of *Joseph*; but he said, the reason “ of that rule failed in the case of trusts, and was of opinion, “ that the first estate in the trustees preserved the whole “ trust, and therefore, whether it was to be considered as “ an executory devise, or contingent remainder of a trust, “ that it was good, and that the plaintiff was entitled to a “ moiety.”]

There is a third question remaining, which is this:

While the contingent remainder subsists, the equitable right to the profits must be in the heir at law, and that will in equity be a freehold in the trust, determinable upon the birth of any other son, it was insisted that may be sufficient to support the contingent remainder.

Whilst the contingent remainder subsists, the right to the profits must be in the heir at law.

I shall not lay much stress on this point, because I think it is not wanting, and I own I took it to be clearly otherwise when it was mentioned at the bar; but by reflecting upon it

HOPKINS I apprehend more may be said to maintain it than I was then aware of.

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The objection to it is this, that the particular estate, and the remainder, must be created at the same time, as making parts of the same estate. This the general rule; but it is equally the rule that where the ancestor has an estate for life, and an estate is limited to the heirs of the body when they are to make one estate tail, that must be by the same conveyance.

And yet this has been held to be, when the estate for life has not been limited by the conveyance, but by way of resulting use.

This was resolved by three Judges; *Hale*, C. J., *Wyld*, and *Rainsford*, against *Twisden*, in the case of *Pybus and Mitford*, 1 Vent. 372.

The case was, *Michael Mitford* covenanted to stand seised of the lands in question, to the use of his heirs male, begotten or to be begotten on the body of his second wife, and died; at the time of making the deed he had issue, *Ralph*, a son by the second wife.

Hale, *Wyld*, and *Rainsford* held, that in this case the use returned or resulted by operation of law to *Michael*, the covenantor, for life, which being conjoined to the estate limited to the heirs male of his body, made an estate tail; and that this estate for life arising by operation of law was as strong as if it had been expressly limited to him for his life, and after his decease to the heirs male of his body.

Now, if the estate for life, which was part of the old use remaining in *Michael*, might unite and be connected with the limitation in tail created by the conveyance, so as to make one estate tail, why may not the resulting trust of the freehold support the contingent remainders, though not created together with it?

There seems to me to be no greater objection to the one than to the other.

There is in that case a saying of my Lord *Hale's* so applicable to the present case, that I cannot pass it by; he says; This is plainly according to the intent of the parties; and if we can by any means serve the intent of the parties, we ought to do it as good exposition; for as my Lord *Hobart* says, Judges in the construction of deeds and wills do no harm, if they are *astuti* in serving the intent of the parties without violating any law.

Lord Hobart says, Judges, in the construction of deeds and wills, can do no harm if they are *astuti*

in serving the intent of the parties without violating any law.

But upon this point I would not be understood to give any absolute opinion.

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There was an objection made on the part of the plaintiff which deserves an answer.

That in the present case it would be impossible to frame such an express limitation as would support the contingent remainders.

And this may be true as to some of them, but not as to all.

It may be to trustees and their heirs, until John Hopkins shall have a son born either during his life or after his decease.

It may be to trustees and their heirs, until Sarah the daughter, and so on as to any of the daughters in being at the death of the testator, shall have a son born.

But as to the sons of daughters, not in *esse* at the death of the testator, I do not see how it can be carried so far.

Upon this some further objections were grafted :

First, That this will be a new invented limitation to preserve contingent remainders, and it has never yet been carried further than during the life of the tenant for life of the land, and the birth of a posthumous son.

Answer. That is the common case ; but there have been others ; and it is not material to restrain it to be during the life of the tenant for life, if it be confined to a life in being.

Second Objection. That all the trusts on such limitations as to the profits have been hitherto to give them to a tenant for life ; this would be to create a new trust for the heir at law, and give the estate back again.

Answer. This is but a common case of a resulting trust for the heir at law, and it is not material whether it is expressed or implied.

[(1) And so it was allowed in the case of *Carrick v. Errington*, 2 P. Wms. 361. “ *Edward Errington* had made “ two settlements of his estates, one by fine in the lifetime “ of his ancestor, which, if at all, could only operate by “ estoppel ; he afterwards made another settlement to trustees, to the use of himself for life, &c. remainder, &c. and “ by a conveyance executed another day, they, to whom the “ fee was limited, executed a declaration of trust for *Thomas*

(1) This part of the judgment, within brackets, is taken from *Atkyns* ; in Lord *Hardwicke's* manuscript the following words only are used, “ *Vide Carrick v.*

Errington, in this Court, and afterwards in the House of Lords, 28th of March, 1729.”

HOPKINS "Errington for life, without impeachment of waste, re-
v. "mainder to trustees to preserve contingent remainders,
HOPKINS. "during the life of *Thomas Errington* : in the conveyance
 "trustees to preserve contingent remainders, were unne-
 "cessarily made, it being a trust estate ; *Edward Errington*
 "died without issue, and the whole legal estate was ad-
 "mitted to be in the trustees : in the second deed they
 "were only trustees of the beneficial interest, and *Thomas*,
 "who was to take the first estate in the trust, was a papist,
 "and disabled by the statute to take any beneficial interest ;
 "and it was insisted that, by the statute, both the trust and
 "legal estate were void, and therefore the estate to go over
 "by that conveyance to the next remainder-man, who
 "should be a protestant, and capable of taking.

"First question, whether the deed was obtained by fraud?

"Second question, whether the legal estate in the trustees,
 "who were only trustees under the first deed, was void,
 "because this remainder-man was a Papist, and incapable
 "of taking ?

"Lord King, and afterwards the House of Lords, held,
 "that the trust being not only to receive rents, &c. but also
 "to preserve contingent remainders, and possibly a person
 "capable of taking might come *in esse*, that *that* was a fur-
 "ther trust, which the statute did not make void ; it had
 "indeed avoided that for life, but as there was another trust
 "upon the legal estate, which might by possibility, be ca-
 "pable of being enjoyed, the estate should remain in the
 "trustees, to support the contingent remainders ; and as to
 "the profits in the mean time (for the remainder-man could
 "not take them, nor the trustees, they being only mere in-
 "struments) the heir at law should have them, till some
 "person came *in esse*, capable of taking under the contin-
 "gent remainders."]

The last thing to be consider d.

Devise of the personal estate.

If this opinion is right as to the land devised, still stronger
 as to the personal estate to be laid out, and the land ac-
 tled, *Papillon v. Voice*. (1)

The consequence from hence. Plaintiff cannot hav such
 a conveyance as he prays by his bill. Neither is he entitled
 to the surplus profits during the life of *William*, the infant.

(1) 2 P. Wms. 471. S. C. and see *Fearne's Contingent Remainders and Exe-
 cutory Devises*, 83, 95, 97, and 110.

Remains to be considered, whether he can have any other relief. According to this opinion, no conveyance ought to be made of the legal estate, but it must remain in the hands of the trustees till it shall be seen whether *John Hopkins*, or any of his daughters living at the testator's death shall have a son, who shall attain twenty-one, for so long there are trusts to be performed by them, and by the plain intent of the will none of the *cestui que trusts* are to come into possession before that time.

HOPKINS
v.
HOPKINS.

Declare that the plaintiff is not entitled to have a conveyance of the trust estate made to him according to the prayer of his bill; therefore dismiss the bill without prejudice to the plaintiff's applying under the former decree for further directions pursuant to the reservation in that decree. (2)

(2) Reg. Lib. A. 1738. fol. 367.

ANONYMOUS. (1)

March 24th, 1738.

It was said by the *Lord Chancellor*, that after publication is past, there is no instance of a plaintiff's obtaining an order to amend his bill, without withdrawing his replication.

1 Atk. 51.
After publication plaintiff cannot amend without withdrawing his replication. (2)

(1) This case is taken from *Atkyns*. It does not appear in *Lord Hardwicke's* Note-book.

(2) Except in the case of an infant, who has been permitted to amend after the cause has been brought on to be heard, *Fawcner v. Watts*, 1 Atk. 405. *Pritchard v. Quinchant*, Amb. 149.; or to add parties, *Goodwin v. Goodwin*, 3 Atk. 370.; or where the matters in the

bill have not been put in issue with sufficient precision, *Filkin v. Hill*, 2 Bro. P. C. 194. ; or where it has been necessary to strike out parties, or to amend the prayer of a bill, *Woollands v. Crowcher*, 12 Ves. 174. *Palk v. Clinton*, ib. 66. ; or where there has been a mere clerical mistake, *Attorney-General v. Newcombe*, 14 Ves. 6.

JONES *v.* BOURGET. (1)

March 30th, 1739.

1 Atk. 298.

A person aggrieved by, or interested in a sentence in the Ecclesiastical Court, may

have a commission of delegates, though he was no party to the original suit.

MR. BOURGET instituted a suit in the Ecclesiastical Court, upon a contract of marriage, against Mrs. *Ann Jubert*, who pending that suit, intermarried with the appellant; a sentence was pronounced in favour of the contract, a child of that marriage was born, and the wife was dead.

Mr. *Jones*, who with the child was very much interested in this sentence, though no party to the original suit, petitioned for a commission of delegates to review the sentence on the statute of the 25th Henry 8.

Upon citing several authorities from the canon and ecclesiastical law, where persons aggrieved by, and interested in a sentence, may have a commission of delegates to review, though no parties to the original suit.

A commission was directed.

(1) This case is taken from *Atkyns*; it agrees with Lord *Hardwicke's* Note of the same case.

EX PARTE CAPOT. (1)

April 4th, 1739.

AFTER a commission of bankruptcy issued, and two dividends made in consequence, one of the assignees brought an action against the bankrupt, and laid him in execution for the residue of the debt, and upon application to the *Lord Chancellor*, three questions were made by his lordship.

1 Atk. 219.
An assignee upon refunding what he had received under two dividends, allowed to make his election, to proceed at law against the bankrupt.

1st. If the creditor was entitled to pursue the person of the bankrupt, and yet receive a proportionable benefit under the commission, which he said he thought was by no means to be done, as the law of bankrupts now stands: the old law considered bankrupts as fraudulent insolvents, and they are often called offenders, (2) but the more modern laws have considered them as unfortunate insolvents, and upon these statutes, these applications have been made to the Court, which has obliged creditors who were proceeding in the double way, to make their election.

The old laws considered bankrupts as fraudulent insolvents, but the more modern, as unfortunate ones, and upon these statutes have the applications been made to compel creditors who proceed in a double

way, to make their election.

The next question was, if he was now at liberty to make his election, or whether he had not made his election by taking the dividends.

But upon refunding what he had received as dividends, his lordship gave him leave to make his election. (3)

The third question was, if he upon refunding, and electing to proceed against the person, should have liberty to come in under the commission and prove his debt, so as to dissent from, or assent to his certificate. (4)

LORD CHANCELLOR said, several such orders were made

(1) This case is taken from *Atkyns*; it does not appear in Lord *Hardwicke's* Note-book.

(2) See *Bromley v. Goodere*, 1 Atk. 77.

(3) But by the stat. of 6 G. 4. c. 16. s. 59., proving or claiming any debt under the commission shall be deemed

an election to take the benefit of such commission.

(4) See *Ex parte Lindsey*, 1 Atk. 220. and *Ex parte Dorvilliers*, 221. *Ex parte Ward*, 1 Atk. 153.; but now by s. 59. of 6 G. 4. c. 16., unless the creditor relinquishes his action or suit, he shall not prove his debt under the commission.

Ex parte
CAPOT.

The reason why such creditor who elects to proceed at law, shall still be allowed to assent or dissent to the bankrupt's certificate, is to make the remedy against the person effectual.

by Lord Chancellor Talbot, and accordingly such order was made in the present case, and he said the reason of the Court for such order was, to make the remedy against the person effectual; for otherwise the person may, by the rest of the creditors, be absolutely discharged from the remedy which this creditor has elected to take.

to the bankrupt's certificate, is to make the remedy against the person effectual.

EX PARTE PLUMMER. (1)

April 4th, 1739.

1 Atk. 103.

A landlord may distrain for his whole rent even after assignment or sale by the assignees, if goods are not removed. (2)

THE question was, whether after a commission of bankrupt taken out, and the messenger in possession, the landlord should distrain the goods upon the premises, and so be satisfied his entire debt, or whether he should come in *pro rata* with the rest of the creditors under the commission.

LORD CHANCELLOR :—If any goods remain on the premises, they are liable to the distress of the landlord, and he may distrain them for his entire debt, even after assignment or sale by the assignees, if the goods are not removed; and this is the reason, because no provision is made in the case of bankruptcy in the statute, which gives the landlord a year's rent on executions.

Assignment has a retrospect so as to avoid any mesne acts done by the bankrupt.

Before assignment, the property remains in the bankrupt, (and the commissioners have only a power) though the assignment has a retrospect, so as to avoid any mesne acts done by the bankrupt.

The rent is here a year and a quarter, and I am of opinion that the landlord is entitled to distrain the goods remaining on the premises for his whole rent, notwithstanding the commission of bankruptcy, and the proceedings thereon.

(1) This case is taken from *Atkyns*; it does not appear in Lord Hardwicke's Note-book.

(2) By 6 G. 4. c. 16. s. 54., no distress for rent made and levied after an

act of bankruptcy, whether before or after the issuing of the commission, shall be available for more than one year's rent accrued prior to the date of the commission.

There was a case before the Lords Commissioners of the Great Seal, where the landlord, though he had made no distress, yet was considered to be within the equity of the statute, which gives him a year's rent upon executions; a commission of bankrupt being an execution in the first instance.

Ex parte
PLUMMER.

The two following cases were cited, *Ex parte Jacques*, December 14, 1730. The landlord distrained, when the messenger under the commission of bankrupt was in possession before the assignment: afterwards the assignees were chosen, and petitioned the Lord Chancellor King to have the goods restored, but the petition was dismissed.

Ex parte Dillon, February 27, 1733. The assignees of the bankrupt were in possession, and the landlord distrained; upon the application of the assignees to the Lord Chancellor to be relieved, and the goods to be re-delivered, his Lordship confirmed the right of the landlord to distrain, and dismissed the petition.

Sir JOHN ROBINSON, Bart. and ANN ROBINSON, an Infant, his Daughter and JOHN CUMYNG and Others	}	Plaintiffs; (1) Defendants.
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May 12th, 1739.

ROBERT SHEFFIELD by his will of the 1st of March, 1724, devises all his lands and tenements to *John Cumyng* and his heirs to the use of him and his heirs in trust nevertheless for the payment of all his debts, and afterwards in trust for his granddaughter *Mary Morgan* and the heirs of her body, remainder to his worthy friend *John Cumyng* and

to pay debts and afterwards in trust for his grand-daughter *Mary Morgan*, and the heirs of her body, remainder to *J. C.* and his right heirs upon condition that he married *Mary Morgan*; recovery suffered by *Mary Morgan* barred the remainder to *J. C.* being the remainder of a trust estate; for the remainder of a legal estate cannot be barred by the recovery of a cestui que trust.

1 Atk. 473.
S. C. Ca.
Temp. Talbot,
164.

R. S. devises his estate to *J. C.* and his heirs to the use of him and his heirs, in trust

(1) The statement of the case and judgment from *Atkyns*, which corresponds with a manuscript report of the Lord Hardwicke's Note-book; the same case.

ROBINSON and his right heirs, on condition he should marry his
 v. grand-daughter, *Mary Morgan*, which was his chiefest
 CUMYNG. desire.

Mary Morgan married the plaintiff, and she and her husband suffered a common recovery wherein she and her husband were vouched, and the uses of the recovery were declared to be to the issue of the marriage with remainder to *Mary Morgan's* right heirs.

Mary Morgan died leaving issue by the plaintiff, two children, and the object of the bill was to make the defendant convey according to the uses declared by the recovery.

Lord *Talbot* decreed the defendant to convey accordingly.

Upon this decree the cause came on to be reheard before Lord *Hardwicke*, and the objection to the decree was that it directed the defendant to convey the remainder in fee, on the ground that the remainder in fee was a remainder of a legal and not of a trust estate.

Mr. *Noel*, Mr. *Floyer*, and Mr. *Moreton*, for the defendant *Cumyng*.

Our objection to the decree is as to the direction touching the remainder in fee, defendant is not obliged to convey it.

This cannot be construed a trust throughout, for a man cannot be a trustee for himself. It is a trust for the benefit of creditors. A trust of the estate tail; but as to the fee it is a legal estate. *Chapman v. Blissett*, was construed a trust throughout in order to perform the intention.

If the testator had gone no further than the devise in tail, the reversion in fee would have been a resulting trust for the heir: then the subsequent disposition of the fee is only a disposition of that resulting trust.

Mr. *Attorney-General*, for the plaintiffs.

I admit that the testator had the whole legal estate vested in him; but the question is concerning the trust.

But this cannot be a legal remainder because there is no particular estate upon which it can depend.

This must be a remainder of a trust estate, because the whole legal estate was in him before.

LORD CHANCELLOR.—The question depends upon this point, whether the remainder to *C.* be a remainder of a legal estate, or of a trust? For a remainder of a legal

estate cannot be barred by a recovery of *cestui que trust* (1), but all the remainders which are trusts only are. (2)

ROBINSON
v.
CUMYNG.

It has been said, that it is impossible for a man to be a trustee for himself; but that is not the point here, for as the legal estate and use is wholly in *C.* by virtue of the first part of the devise, the remainder cannot be in him, for that is part of the estate he had before, and unless the testator had given *C.* the remainder of the trust, it would have resulted to his heirs at law: he has therefore given him an interest distinct from either the legal estate or the use, which is the remainder of the trust, and he has given him that *on a condition* which would be entirely defeated if he had taken the remainder of the legal estate by the former part of the devise; and therefore his Lordship decreed, that the recovery of *D.* barred the remainder to *C.*

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- (1) So *Salvin v. Thornton*, 1 Bro. *Carpenter*, 1 Vern. 440. *Beverley* C. C. 73. in note, S. C. Ambl. 545. *v. Beverley*, 2 Vern. 131. *Boteler v. Shapland v. Smith*, 1 Bro. C. C. 74. *Allington*, 1 Bro. C. C. 72. Lord *Philips v. Brydges*, 121. *Grenville v. Blyth*, 16 Ves. 224.
- (2) So *North v. Champemoon*, 2 *Wykham v. Wykham*, 18 Ves. 395. Ch. Ca. 63, 78. 1 Vern. 13. S. C. (3) Reg. Lib. B. 1738. fo. 291.
- 1 P. Wms. 91. S. C. *Carpenter v.*

PROBERT v. CLIFFORD.

ESTHER PROBERT, Widow of HENRY }
 PROBERT the Younger } Plaintiff; (1)
 and
 THOMAS CLIFFORD and Others . . Defendants.

May 11th and 12th, 1739.

1 Atk. 440. In marriage contracts when the fortune of the wife is paid to the father, or to clear incumbrances, or to the son; and the father and the son who are parties to the marriage contract, covenant jointly that the wife's jointure shall be of a certain value, in case of a deficiency the wife has a lien both upon the estate of the father and son.

And where a person having a power to charge an estate with 2,000*l.* after the death of his wife, gives her 1,000*l.* payable with interest three months after his own death; held that the gift of the 1,000*l.* was a good execution of the power, though it could not be raised at the time appointed; and that the interest could not be made good until it amounted to 2,000*l.* for that would be to charge the estate with the principal sum of 2,000*l.*

A widow is entitled in respect to her *paraphernalia* to marshal assets as against real estates descended; (2) but not as against a devisee. (3)

By a settlement made on the 3rd of April, 1700, on the plaintiff's marriage with *Henry Probert* the younger, in consideration of the marriage and 3,000*l.* portion paid to *Henry Probert* the younger, by the consent and direction of his father *Henry Probert* the elder, and in consideration of 1,600*l.* to *Thomas Morgan*, and 1,400*l.* paid to *Thomas Morgan* and *John Morgan* by *Henry Probert* the younger, by direction of *Henry Probert* the elder, to be applied to particular trusts mentioned in a former settlement, *Henry Probert*, the elder and *Henry Probert*, the

(1) The statement of this case and the arguments of counsel are taken from *Lord Hardwicke's* Note-book; the judgment from *Atkyns*.

(2) *Tipping v. Tipping*, 1 P. Wms. 729. *Snelson v. Corbet*, 3 Atk. 369.

(3) So *Ridout v. Lord Plymouth*, 2 Atk. 105. See *Tynt v. Tynt*, 2 P. Wms. 542. *contra*; but if estates

are devised subject to the payment of debts the Court will in respect of *paraphernalia* marshal the assets against estates devised. *Inledon v. Northcote*, 3 Atk. 430. *Ridout v. Plymouth*, 2 Atk. 105. *Boynton v. Parkhurst*, 1 Bro. Ch. Ca. 576. *Aldrich v. Cooper*, 8 Ves. 397.

younger, granted certain premises from and after the death of *Henry Probert* the younger, to the use of the plaintiff for her life. for her jointure and in lieu of dower, with remainder to such of the sons by her as *Henry Probert* the younger, should appoint, and both the father and son covenant for themselves, their heirs and executors, that the premises limited for her jointure, are and shall continue during her life of the clear yearly value of 300*l. per annum*, over and above all charges and expenses whatsoever, public taxes to the king or government excepted.

PROBERT
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By a settlement made in 1706, and to which *Henry Probert*, the elder and younger were parties; the remainder in fee of the lands comprised in the first settlement were limited to *Charles Probert*, a son of *Henry Probert*, the elder, by a second marriage; and a term of 500 years on the same premises was limited to trustees to commence after the death of *Henry Probert* the younger and the plaintiff, to raise 2,000*l.*, and pay the same within two years after such commencement as *Henry Probert* the younger, should by deed or will appoint, and in default of such appointment to pay 500*l.* a-piece to his two sisters, *Elizabeth Morgan* and *Rachel Clifford*, in such case the payment of the other 1,000*l.* was to cease.

Henry Probert the younger, by his will of the 8th of December, 1726, did thereby firmly charge all his real estate with the sum of 1,000*l.* to be paid by his sisters out of their respective shares of his estate, unto the plaintiff in three months after his decease; and devised all his estate given him by his cousin *Henry Probert* to *Francis Jenkins* and *Thomas Clifford*, and the survivor; but if his personal estate fell short of the legacies thereby given, such deficiency to be made good by disposal of that part of the estate given to *Jenkins* and *Clifford*.

Henry Probert the younger, survived his father, and died without issue; and *Charles Probert* was dead, having devised his reversion in the jointure estate to his sisters.

The executor of *Henry Probert* the younger, had taken possession upon his death, of the *paraphernalia* of the plaintiff, which consisted of diamonds, rings, and earrings.

The estate in jointure was proved to be only of the value of 240*l. per annum*, after all deductions, except taxes.

Mr. *Browne* and Mr. *Noel*, for the plaintiff, insisted that the 1,000*l.* ought not to be considered as a satisfaction for

PROBERT v. CLIFFORD.

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or to the son; and the father and the son who are parties to the marriage contract, covenant jointly that the wife's jointure shall be of a certain value, in case of a deficiency the wife has a lien both upon the estate of the father and son.

And where a person having a power to charge an estate with 2,000*l.* after the death of his wife, gives her 1,000*l.* payable with interest three months after his own death; held that the gift of the 1,000*l.* was a good execution of the power, though it could not be raised at the time appointed; and that the interest could not be made good until it amounted to 2,000*l.* for that would be to charge the estate with the principal sum of 2,000*l.*

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younger, granted certain premises from and after the death of *Henry Probert* the younger, to the use of the plaintiff for her life. for her jointure and in lieu of dower, with remainder to such of the sons by her as *Henry Probert* the younger, should appoint, and both the father and son covenant for themselves, their heirs and executors, that the premises limited for her jointure, are and shall continue during her life of the clear yearly value of 300*l. per annum*, over and above all charges and expenses whatsoever, public taxes to the king or government excepted.

PROBERT
v.
CLIFFORD.

By a settlement made in 1706, and to which *Henry Probert*, the elder and younger were parties; the remainder in fee of the lands comprised in the first settlement were limited to *Charles Probert*, a son of *Henry Probert*, the elder, by a second marriage; and a term of 500 years on the same premises was limited to trustees to commence after the death of *Henry Probert* the younger and the plaintiff, to raise 2,000*l.*, and pay the same within two years after such commencement as *Henry Probert* the younger, should by deed or will appoint, and in default of such appointment to pay 500*l.* a-piece to his two sisters, *Elizabeth Morgan* and *Rachel Clifford*, in such case the payment of the other 1,000*l.* was to cease.

Henry Probert the younger, by his will of the 8th of December, 1726, did thereby firmly charge all his real estate with the sum of 1,000*l.* to be paid by his sisters out of their respective shares of his estate, unto the plaintiff in three months after his decease; and devised all his estate given him by his cousin *Henry Probert* to *Francis Jenkins* and *Thomas Clifford*, and the survivor; but if his personal estate fell short of the legacies thereby given, such deficiency to be made good by disposal of that part of the estate given to *Jenkins* and *Clifford*.

Henry Probert the younger, survived his father, and died without issue; and *Charles Probert* was dead, having devised his reversion in the jointure estate to his sisters.

The executor of *Henry Probert* the younger, had taken possession upon his death, of the *paraphernalia* of the plaintiff, which consisted of diamonds, rings, and earrings.

The estate in jointure was proved to be only of the value of 240*l. per annum*, after all deductions, except taxes.

Mr. *Browne* and Mr. *Noel*, for the plaintiff, insisted that the 1,000*l.* ought not to be considered as a satisfaction for

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the deficiency of the jointure; the legacy being intended by the testator as a legacy of bounty.

As to the 1,000*l.*, it is objected that it cannot be raised until after the plaintiff's death; the will directs it to be raised three months after the testator's death, and it is only a 1,000*l.*, which is less by one-half than he had the power of raising, and the other 1,000*l.* may be applied by way of interest.

As to the *paraphernalia*, it is objected that the personal estate is deficient by reason of debts.

But the plaintiff is entitled by way of circuitry to stand in the place of the specialty creditors to have a satisfaction out of the real estate.

Mr. *Chute* for the executor of *Henry Probert* the elder, insisted that the assets of the father were not liable to make good the covenant, but if liable not until the assets of the son had been first applied; the father was only a surety for the son; the covenant is joint, and the charge survived against the son.

The *Attorney-General* for the executors of *Henry Probert* the younger, and for those entitled to the estate in jointure expectant upon the plaintiff's death, insisted that the father and son were both equally contracting parties to the plaintiff's settlement, and though the son survived the father, this Court would, by the rules of equity, make both their estates liable. And he likewise insisted that his will was not a good execution of his power. The estate which he had a power to charge was not his estate, if so, that the 1,000*l.* would go between the sisters.

May 12, 1739.

LORD CHANCELLOR.—In marriage contracts, when the fortune of the wife is paid to the father, or to clear incumbrances, or to the son; and the father and the son are parties to the marriage contract, the wife has a lien both upon the estate of the father and son.

As to the woodland part of the estate, it appearing that notwithstanding a valuation was made of what arose from the felling of timber and cutting wood every year, a deficiency still remained to satisfy the jointure. An account of assets was decreed, and that the deficiency in the jointure should be made good out of the personal estates of the father and son, pursuant to their covenant and in case that should be deficient, out of their real estates, liable to their debts by specialty.

LORD CHANCELLOR held, that the legacy of 1,000*l.* given

by will to the wife, ought not to be considered in this case as a satisfaction for the deficiency of her jointure, because that did not arise till after his death, and therefore could not at that time, be in his consideration; and as the jointure lands are covenanted by the marriage settlement to be worth so much clear of all reprises, the testator plainly intended the 1,000*l.* as a bounty to her.

the deficiency of her jointure, for as the jointure lands are covenanted to be clear of all reprises, the testator intended the 1,000*l.* as a bounty.

There was another question, out of what fund this legacy was to be paid? For by the settlement, the husband had a power to charge the estate with 2,000*l.* after the death of his wife, and a term of years was raised for that purpose.

The words of the husband's will were, "*First, I charge all my real estates*" &c.

LORD CHANCELLOR.—If a man has a power to charge an estate, it is not necessary, in the execution of it, he should refer to the deed out of which the power arises; for in a court of equity it is enough that his intent appears, and if in the execution he sufficiently describes the estate he had a power to charge, the estate is certainly bound, especially where the person charging is a purchaser of the power.

the deed out of which the power arises.

He has indeed mistaken a circumstance with respect to the time of raising it, but that will not make it void.

It is insisted for the plaintiff, that as the husband by his will left her the 1,000*l.* payable with interest, the interest should be made good till it amounts to the sum of 2,000*l.* which he had a power to raise.

But his Lordship said as to that, the 1,000*l.* being the only charge upon the estate, he was of opinion that the interest should not be made good out of the power, for that is to charge the estate with a principal sum of 2,000*l.*

With regard to the *paraphernalia*, it was strongly insisted upon by the counsel for the defendant, that the wife cannot stand in the place of bond creditors; and the case of *Tipping v. Tipping*, 1 P. Wms. 729. was cited for that purpose.

LORD CHANCELLOR.—Where there are real estates descended, the wife may be entitled to her *paraphernalia*; (1)

entitled to her paraphernalia, but otherwise in this case, where the real estates came by the husband.

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The 1,000*l.* given by the will to the wife, cannot be considered as a satisfaction for worth so much,

If a person in the execution of a power sufficiently describe the estate he had a power to charge, the estate is bound, though there is no reference to

Where there are real estates descended, the wife may be

(1) In Lord *Hardwicke's* Note-book, there are the following words:—"Paraphernalia; if real assets descended liable."

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but otherwise in this case, where the real estates came by the husband, and said the case in 2 Vern. 246. had been carried full far enough, for though it is there laid down that where *A.* dies intestate, or by will doth not dispose of the jewels, his wife may claim, in case there be no debts, the jewels suitable to her quality to be worn as the ornaments of her person; yet by the old law they were absolutely in the power of the husband; and if he by will devised away the jewels, such devise should stand good against the wife's claim of *paraphernalia*, Cro. Car. 343. and 1 Roll. Abr. 911. sect. 9. (2)

His Lordship referred it to the Master to inquire how much the clear yearly value of the jointure lands had fallen short of 300*l.* *per annum* over and above all charges and reprises, taxes excepted from the time of the plaintiff's husband's death, and by what means such deficiency was occasioned, and what the clear value was then; and directed the deficiency to be made good out of both the personal estates of *Henry Probert* the elder and *Henry Probert* the younger, and in case the respective personal estates were deficient, then their respective real estates liable to specialty debts, or so much as should be sufficient, were to be sold or mortgaged in order to make good such deficiency; and his Lordship declared that the plaintiff is entitled to 1,000*l.* given her by the will of her husband, to be raised out of the lands comprised in the 500 years' term, to be raised according to the trusts of that term, but that the principal cannot be raised until two years after the commencement of such term in possession. And his Lordship reserved liberty for the representatives of the plaintiff to apply to the Court for directions touching the same, and his Lordship reserved the consideration of interest upon the 1,000*l.* from the end of three months after her husband's death, to be made good out of the real estates descended or devised until after the accounts were taken, when it might be seen whether the same were sufficient to answer his debts; and as to the plaintiff's

(2) The paraphernalia of the wife, which have a preference over legacies, and are liable to the husband's debts, and are liable to the husband's debts, *Tipping v. Tipping*, 1 P. Wms. 729. *Snelson v. Corbet*, 3 Atk. 369. *Campion v. Cotton*, 17 Ves. 272., though they may be sold or given away by the husband, cannot by his will be devised during his wife's life, *Tipping v. Tip-*

ping, 1 P. Wms. 729. *Seymour v. Trevilyan*, ante, page 109. *Northey v. Northey*, 2 Atk. 77. But if the presents be made to the wife either before or after the marriage by a relative or friend they are to be considered as gifts made to her separate use, *Graham v. Lord Londonderry*, 3 Atk. 393.

demands of her *paraphernalia* in case the personal estate of her husband should be found sufficient to answer his debts, it was ordered that such *paraphernalia* as had been possessed by any of the defendants should be delivered to her by such of the defendants as had possessed the same, and in case such his personal estate should be exhausted by the payment of his debts, his Lordship declared that the plaintiff was entitled to have a satisfaction for her *paraphernalia* out of his real assets descended to his heir at law, that should be remaining after all his debts are paid. (3)

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(3) Reg. Lib. B. 1738. fo. 310.

HANS STANLEY, and ELIZABETH,
ANN, and SARAH STANLEY (his }
Sisters) infants, by EDWARD HOO- } Plaintiffs; (1)
PER, their next Friend }
and
PHILLIPPA STANLEY, Widow, and }
ANNE STANLEY, Widow . . . } Defendants.

May 14th, 1739.

WILLIAM STANLEY, and *Anne*, his wife had two sons, *George* and *Hoby*, who severally married in their father's lifetime; *William* the father dies, *Anne* his wife survives him, *George* afterwards dies, and leaves several children, who are still living; then *Hoby* dies intestate (leaving *Phillippa* his wife) possessed of a very large personal estate. *William* the father dies, *Anne* his wife survives him; *George* afterwards dies, and leaves several children, who are still living, then *Hoby* dies intestate, leaving *Phillippa* his wife possessed of a very large personal estate.

1 Atk. 455.

William Stanley, and *Anne* his wife, had two sons, *George* and *Hoby*, who severally married

The children of *George* bring a bill against *Phillippa*, who has administered to her husband, and also against *Anne* their grandmother, insisting, that, as the representatives of their father, they were entitled with their grandmother to one half of the moiety of the intestate's estate, the wife being entitled to the other moiety, by the 22 and 23 Car. 2. c. 10.

The residue of the intestate's estate, after satisfaction of debts, directed to be divided into four equal parts, two fourth parts thereof to be retained by *Phillippa* the intestate's widow, one fourth part to be paid to *Anne Stanley* the intestate's mother, and the remaining fourth part to be laid out in South Sea Annuities, in the name of the *Accountant General*, subject to the order of the Court, for the benefit of the children of *George*, equally to be divided.

(1) This case is taken from *Atkyns*; it corresponds with Lord *Hardwicke's* Note-book, and a manuscript report of the same case.

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The children of *George* bring this bill against *Phillippa*, who had administered to her husband, and also against *Anne* their grandmother, insisting that, as the representatives of their father, they were entitled with their grandmother to one-half of the moiety of the intestate's estate, the wife being entitled to the other moiety by the 22d and 23d Car. 2. c. 10.

It was insisted for the plaintiffs by the *Attorney-General*, Mr. *Chute*, and Mr. *Banks*, that by the statute of the 1st Jac. 2. c. 17. s. 7. it is enacted, that if after the death of the father, any of his children should die intestate, without wife or children in the life of the mother, every brother and sister, and the representatives of them, shall have an equal share with the mother.

In this case there is a wife left, but the intent of the act was to put the intestate's brothers and sisters and their representatives, in the same light and condition with the mother; so that whenever the mother was entitled, the brothers and sisters, and their representatives (*per stirpes*,) were to have an equal share with her, and cited the case of *Keylway v. Keylway*, 2 P. Wms. 344. Pasch. 12 Geo. which was as follows: The plaintiff was the widow and administratrix of one that died intestate having no children, but left a mother, a brother and sister, and brother's children, and it was decreed the wife should have a moiety, and the other moiety equally to the mother, brother and sister, and brothers' children, (as representatives of the father, *per stirpem*), which case is exactly the same with the present in every circumstance, except that in the present case the intestate had no brother and sister living at his death, which is not material, in regard that the children of the brother take by way of representation.

It was insisted for the defendant, the intestate's mother, by Mr. *Browne*, Mr. *Gundry*, and Mr. *Hopkins*, that these statutes are to receive a favourable construction to exclude representations in a remote degree, in respect of collaterals, agreeable to the case of *Carter v. Crawley*, Raym. 496., and that the words in the statute of James are in the conjunctive, and require a brother or sister to be *in esse*, as well as representatives of brothers and sisters to make a case within that statute.

Where an intestate leaves brother's and sister's children, and no brother or sister, they take *per capita*, as next of kin, and not by representation; so if he died, leaving aunts and nieces, and no brothers or sisters, they would all take *per capita*; but if the father of the nieces had been living, he would have taken the whole.

It has been determined, that when the intestate leaves

Where an intestate leaves brother's and sister's children, and no brother or sister, they take *per capita*, as next of kin, and not by representation; so if he died, leaving aunts and nieces, and no brothers or sisters, they would all take *per capita*; but if the father of the nieces had been living, he would have taken the whole.

brother's or sister's children, and no brother or sister, such children take *per capita*, as next of kin, and not by representation, *Walsh v. Walsh*, 1 Eq. Ca. Ab. 249. pl. 7. and that the construction of the statute was the same if a man died leaving aunts and nieces, and no brother or sister, such aunts and nieces would all take *per capita*, and the nieces could not take *per stirpes*; and yet if the father of the nieces had been living, he would have taken the whole, and this was determined in the case of *Durant v. Priestwood*, June 30th 1738. (2)

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And from hence it was argued, that as there was no brother or sister of the intestate living, if the plaintiffs in this case took anything, it must be necessarily *per capita*, and not by representation; that when brother's children take *per capita*, they must necessarily take as next of kin, because, as they are not in equal degree with the intestate's mother, they could not otherwise take at all.

And it was further urged, that if they were entitled by representation, it might be carried to the fourth or fifth generation, for there was nothing to restrain it in this act, as there was in the statute of distributions, which would create great confusion and fractions in the estates of *intestates*.

LORD CHANCELLOR:—There are two questions in this case, May 14, 1739.

1st. Whether the plaintiffs, who are the nephews and nieces of the intestate, shall share with the intestate's mother, there being a widow of the intestate?

2dly. Supposing they may share, notwithstanding that objection, whether they can come in, in respect that there is no *brother or sister* of the intestate living?

As to the first, it is directly within the case of *Keylway v. Keylway*, and I am satisfied with the reason of that case. It depends upon the construction of the proviso in the statute of *James*, which is very incorrectly penned, and so is the statute of distributions; and therefore a construction is to be made upon the second statute, according to the intent and meaning of the legislature.

The statute of distributions, and the statute of James 2, very incorrectly penned, and therefore the latter is to be construed according to the intent of the legislature.

Upon the statute of distributions, the descending line excluded all collaterals, and afterwards went to the next of kin; so that the father or mother would take all. As, sup-

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pose a rich citizen died *intestate*, his share would all go to the mother; therefore the subsequent statute intended she should have a provision only equal with a brother and sister of the intestate.

As to the second question, it is a new one; for the intestate has left no brother or sister for the mother to collate, or share equally with.

The case of *Walsh v. Walsh*, is grounded upon the statute of Car. 2. s. 5. The words of the act do suppose that there must be some persons to take in their own right, and others in right of representation; but the statute of *James 2nd* is of a different kind, and lets in another person.

The word
“and” in the
7th sect. of 1
James 2. c. 17.
immediately
preceding the
words “the
representa-
tives” must be

Here is a mother takes an original share in her own right, and the brother’s and sister’s children take as if the brother and sister were living; for the word “and,” immediately preceding the words, “the *representatives*,” must be construed in the disjunctive.

The proviso in
the statute of
James is to be
incorporated
into the statute
of *Charles*
where it says,
that representa-
tions shall not
be carried be-
yond brothers’
and sisters’
children. The
rule is, that statutes made *pari materiâ*, shall be construed into one another.

construed in the disjunctive.

As to the objection, that such representation might be carried to several generations, I think that consequence does not follow, for the proviso in the statute of *James* is to be incorporated into the statute of *Charles*, which expressly says, that representations shall not be carried beyond brothers’ and sisters’ children, and this is agreeable to the rule my Lord *Hale* lays down in 1 Ventr. that statutes made *pari materiâ* shall be construed into one another.

I think the statute of *James* intended to let in the rule of the civil law, which contained three lines, ascending, descending, and collateral; the descending line absolutely excluded all others, the ascending excluded all collaterals except brothers and sisters, and they took alike.

His lordship therefore ordered the residue of the intestate’s estate, after satisfaction of debts, to be divided into four equal parts, and two-fourth parts thereof to be retained by the defendant *Phillippa*, the intestate’s widow, and one-fourth part to be paid to the defendant *Anne Stanley*, the intestate’s mother, and the remaining fourth-part to be laid out in *South Sea Annuities*, in the name of the *Accountant General*, subject to the order of this Court, for the benefit of the plaintiffs the infants, equally to be divided. (2)

STEVEN UNWIN and MORLEY UN- } Plaintiffs; (1)
WIN }
and
ROBERT GROSVENOR Surviving Assign- }
née under a Commission of Bankruptcy } Defendant.
against MARTIN UNWIN }

Shewing Cause against a Decree.

May 14th, 1739.

MARTIN UNWIN being, under an order of the Court, appointed receiver of the Duchess of *Montagu's* estate, and the plaintiffs having entered into a recognizance as his sureties, by way of counter-security *Martin Unwin* in consideration of 500*l.* due to the plaintiffs on balance of accounts, and for their security against the recognizance, assigned several debts due to himself, and a month after the assignment became a bankrupt, and this was a bill brought to compel defendant to account for such monies as defendant had received out of any debts assigned to plaintiffs, and to suffer plaintiffs to make use of his name to secure the residue, and to restrain defendant from recovering the debts.

Martin Unwin makes an assignment of debts due to himself, in order to secure the sum of 500*l.* due to the plaintiffs, and for their security against a recognizance entered into by them on his behalf, and a month afterwards becomes bankrupt;

Held, that the assignment is good and not fraudulent against the other creditors of the bankrupt. (2)

Mr. Pilsworth and *Mr. Mason* for the defendant.

This assignment is fraudulent: Fraudulent assignments bind the bankrupt but not the assignees. There is more recited to be due in the agreement than was really due from *Martin Unwin*. These debts remained in the power of the bankrupt, and there was no notice to the debtors before the bankruptcy, and they relied upon the statute, of the 21 Jac. 1. c. 19. sect. 7.

(1) The arguments of counsel in this case are taken from Lord *Hardwicke's* Note-book; the statement of the case and the judgment from a manuscript report.

(2) It seems however that a conveyance made by a trader before an act of bankruptcy and made in contemplation

of such act with a view to give a preference to a particular creditor, is void, See *Worsley v. De Mattos*, 1 Burr. 467. *Harman v. Fishar*, Cowp. 117. *Hartshorn v. Slodden*, 2 Bos. & Pull. 582.

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Lord Chancellor, declared it to be clear if the assignment was not fraudulent that it was a good assignment not within the bankruptcy, and that assignees in respect of acts done by the bankrupt which create either a legal, or equitable charge on his estate stand just in the place of the bankrupt. So is *Taylor v. Wheeler*, 2 Vern. 565, which was determined on great consideration.

Before Lord *Macclesfield* there was a stronger case. *Cock v. Goodfellow*. A widow in 1720, being then very near a bankruptcy, and who became so very soon after, transferred great quantities of stock, and also assigned several debts to secure portions given by her husband to her children. No legal interest, but only an equitable one passed by this assignment, yet the children on a bill brought here, were, on great consideration, decreed to have the benefit of this assignment.

But it is objected that this assignment was made but a month before the bankruptcy. Yet it was made before it, and if a man makes any disposition for securing the payment of debts, or for valuable consideration before he actually becomes a bankrupt, it shall have its effect.

There is no such thing as an equitable bankruptcy, nor any other than the law has made so, and till he is a bankrupt, he may prefer which of his creditors he will in payment. There was a case indeed before Sir *Joseph Jekyll*, which broke in a little upon this rule (*Small v. Cudling*) where the assignees founded their bill on the pretence of an undue preference given by the bankrupt when a failing man, to one set of creditors by such an assignment, and the assignment was set aside. But on an appeal to Lord *King*, the decree was reversed, and an issue directed, whether bankrupt or not, for in that case the bankruptcy happened in a day or two after the assignment, and held that the point turned wholly on that fact, whether actually bankrupt at that time or not.

But the present assignment is clear of all apprehensions of that kind, the bankruptcy not being till a month after. Then it is objected more is assigned than was due, but that is not material, the persons to whom the assignment was made, being liable to be damnified, which is a sufficient consideration. If the sureties are liable to pay the debts, and he is become a bankrupt, that is an absolute damnification at law. It is again objected that this is fraudulent, because no notice is given to the debtors whose debts are assigned.

It would be a defence, indeed for them if they had paid it to the assignor, and were afterwards sued by the assignee, but it is no defence on the part of the present defendants; and it is objected that this assignment, according to the doctrine of *Twyne's* case, 3 Co. 81, is fraudulent, because the property remained still in the assignor. But that doctrine extends not to such an assignment as this, but only to an assignment or sale of chattels which lie in livery. *Choses in action* will always remain in some measure in the power of the assignor.

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Decree affirmed.

LORD ABERGAVENNY Plaintiff; (1)

and

EDMUND THOMAS Defendant.

May 18th, 1739.

THIS was a bill brought by the lord of a manor against the defendant, who continued in possession of a copyhold estate of the manor, after the lives for which it had been granted had expired, and had confounded the copyhold lands with part of his own freehold lands. The object of the bill was to distinguish the copyhold lands from defendant's freehold lands, and set out the boundaries, and if that could not be done, then that an equal quantity of land might be set out and held to be enjoyed as copyhold, and for an account of rents due after the expiration of the lives for which the copyhold had been granted.

In order to establish a right in a tenant of a copyhold estate for lives to a renewal, he must shew in certain upon payment of what fine he has a right to renew.

The defendant, by his answer, insisted, that the plaintiff was not entitled to the possession of the copyhold estate, on the ground that though the estate was a copyhold estate for

(1). The statement of this case and Lord *Hardwicke's* Note-book; the arguments of counsel are taken from judgment from a manuscript report.

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lives, there was a right of renewal upon payment of a reasonable fine.

It was admitted that the boundaries were confounded by a unity of possession, and that the three lives for which the copyhold was granted, had expired.

On the part of the plaintiff, it was proved by the steward of the manor, that he had demanded thirteen years purchase for a full estate; that the last two stewards had only demanded ten years purchase; that since he had been steward, no person had insisted upon a right to renew a copyhold estate after the expiration of three lives except the defendant; and it was likewise proved by a person who had been under-steward for twenty-two years, that he used to compute two lives at seven years purchase, and three lives at ten years purchase, and that he knew of no instance of any person claiming a right to renew.

On the part of the defendant, it was proved, that when any copyhold estate for lives determined, there was a custom in the lord's court to make proclamation for the heir to come in and pay his fine.

The *Attorney-General*, for the plaintiff, insisted that the meaning of the proclamation was to know whether any right was subsisting under the copy, and that there was no custom proved.

Mr. *Chute* and Mr. *Wilbraham* for the defendant, insisted that though it was not ascertained, a Court of Law would ascertain what a reasonable fine was, and they insisted that an issue ought to be directed, and cited 13 Co. 1, 2. and *Middleton* and *Jackson*, 2 Ch. Rep. 35.

May 21, 1739. LORD CHANCELLOR.—All copyhold estates were originally estates at will, but by length of time are become almost equal to freeholds, and are now part of the constitution, and as such are to be supported, and the law has gone so far as to ascertain what shall be a reasonable fine, where the custom has been to renew, upon payment of a fine, uncertain. But it has no where fixed what shall be a reasonable fine upon which to renew copyholds for lives, and therefore if a tenant would set up such a right of renewal, he must shew in certain upon payment of what fine he has a right to renew, as upon payment of three years' value. In the case of the Duke of *Grafton*, where his tenants set up a right of renewing their copyholds for lives, upon payment of a reasonable fine, so as the same did not exceed three years' value Lord Chancellor *King* directed an issue to try the custom, but it

was reversed in the House of Lords, because it appeared by the rolls of the manor that there had been no fixed fine, only that the tenants had seen what was the highest had ever been taken, and then set up a custom of renewing upon payment of a reasonable fine, so as the same did not exceed such value. But if this was allowed, such customs might be set up in almost all the manors in the kingdom.

It was proved, that there had been a proclamation in the lord's court, for the heir to come in and renew, or to shew cause why the lord should not enter upon the estate as his own. This is not proof of a tenant's right of such renewal : but done only in order to prefer the heir before any other in case he will agree for the renewal ; and the person who has been steward for above twenty years, has sworn that he never knew any tenant insist upon such a right before the present defendant. The decree must therefore be that there be a commission to ascertain the boundaries, and that the defendant pay the plaintiff his costs. (1)

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(1) Reg. Lib. B. 1738. fo. 294.

BENSON v. BALDWYN. (1)

May 19th, 1739.

LORD CHANCELLOR.—Where a man is entitled to a rent out of lands, and through process of time the remedy at law is lost, or become very difficult, this court has interfered and given relief, upon the foundation only of payment of the rent for a long time, which bills are called bills founded upon the *solet* : Nay, the court has gone so far as to give relief, where the nature of the rent (as there are many kinds at law) has not been known, so as to be set forth, but then all the tenants of the lands, out of which the rent issues, must be brought before the Court, in order for the Court to make a complete decree.

1 Atk. 598.

A bill may be brought for rent in this Court where the remedy at law is lost or becomes very difficult, and this court will relieve on the foundation of payment for a length of time.

(1) This case is taken from *Atkyns*. that the plaintiff being entitled to a moiety of certain manors, and to a cer-

tain fee farm rent issuing thereout, brought his bill against *Heath*, and Mr. and Mrs. *Baldwyn*, *Heath* being entitled to the other moiety, part absolutely, and part subject to the life estate of Mrs. *Baldwyn*, who was entitled thereto under marriage articles, alleging by his bill that they ought to pay a portion of the said fee farm rent, but that *Heath* claimed an exemption during Mr. *Baldwyn's* life, and Mrs. *B.* an exemption under her marriage articles; and the bill prayed a discovery whether they were in possession of the lands chargeable with the rent or some part thereof, and an account of the arrears and payment thereof.

The *Master of the Rolls* directed an enquiry as to what lands were charged with the rents, and made an

order upon the Master's report, that Mrs. *Baldwyn* (her husband being dead) should pay the arrears of a certain quit rent to the plaintiff, and should pay the same during her life, and after her death, the same should be paid by *Heath*. From this order Mrs. *Baldwyn* appealed, insisting that the order was not warranted by the report, and it appears by the *Lord Chancellor's Note-book*, that the only point in discussion was whether the lands in jointure were alone chargeable with the quit rent, or whether other lands in the possession of *Heath* were likewise chargeable.

The *Lord Chancellor* reversed the order, and directed the Master to review his report. (2)

BANKS v. WEBB.

JOHN BANKS Plaintiff; (1)
 and
 SIR JOHN WEBB, JOHN WEBB, and }
 THOMAS WEBB } Defendants.

AND

SIR JOHN WEBB and JOHN WEBB . Plaintiffs;
 and
 JOHN BANKS Defendant.

May 22d and 23d, 1739.

THE plaintiff, *John Banks*, brought his bill to have a division of a waste called *Canford Heath*, according to the shares to which the plaintiff and defendants were entitled, either according to the terms of an agreement of the 7th of December, 1639, or according to the original right which each party had antecedent to the agreement.

The ancestors of the plaintiff, Sir *John Banks*, being seised of the manor of *Canford Priors*, and the ancestors of the defendant, Sir *John Webb*,

being seised of the manor of *Great Canford*, in 1639 entered into an agreement, whereby after reciting that there were wastes lying intermixed, which belong to both manors, and that one fourth part belonged to *Canford Priors*, and that *J. Webb* and his ancestors had made enclosures thereof, it was agreed that Sir *J. Banks* might inclose fifty acres of the heath, and that *J. Webb* might enjoy the lands formerly inclosed, and that the residue should be divided into four equal parts; one fourth to be enjoyed by Sir *J. Banks*, and the remaining three fourths by *J. Webb*; and the same division should be made in the event of an inclosure; upon a bill brought by the plaintiff for a specific performance of the agreement, or in case the Court should not think fit to execute the agreement, that the limits and boundaries of the waste belonging to each manor might be ascertained; upon the ground that the agreement was made by a tenant for life, who could not bind the remainder man; that it had not been carried into execution within a hundred years; that the acts of ownership on the part of the defendants' ancestors, inconsistent with the agreement, far outweighed the acts of ownership on the other side, a specific performance of the agreement refused; and the plaintiff not having shewn a title to or possession of the soil, or any impediment why he could not establish his title at law; the Court would not direct a commission or an issue to ascertain the boundaries of the waste; and a cross bill by the defendant, that he might be quieted in possession of the waste, dismissed, being founded upon a mere legal title, and no trials at law having been had to try the right.

Sir *J. Webb*, the plaintiff in the second cause, by his cross bill claimed title to the whole of *Canford Heath*, as the waste of his manor, and prayed to perpetuate the testi-

(1) The statement of this case and judgment *verbatim* from a manuscript the arguments of counsel are taken from in his Lordship's handwriting.
 Lord *Hardwicke's* Note-book; the

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mony of his witnesses, and that he might be quieted in the possession of it.

Sir *John Banks*, the great-grandfather of the plaintiff *Banks*, being entitled to the manor of *Canford Priors*, and *John Webb*, the grandfather of the defendant Sir *J. Webb*, being entitled to the manor of *Great Canford*, by an indenture, dated the 7th of December, 1639, and made between the said Sir *J. Banks* of the one part, his Majesty's Attorney-General, and the said *J. Webb* of the other part, after reciting that Sir *J. Banks* was seised of the manor of *Canford Priors*, and the said *J. Webb* of the manor of *Great Canford*, to which there were great wastes and commons belonging, lying intermixed, and that one-fourth part thereof belonged to the manor of *Canford Priors*, and *John Webb* and his ancestors had made inclosures of part of the wastes and commons; now for recompense to be made to the said Sir *J. Banks*, for such inclosures, it was agreed, that the said Sir *John Banks* might inclose fifty acres of the said heath, and have the same for his own benefit; and that *John Webb* might enjoy the lands formerly enclosed; and that the residue of the said heath and common grounds should be divided into four equal parts: one-fourth to be enjoyed by Sir *J. Banks* and his tenants, and the remaining three-fourths to be enjoyed by *John Webb* and his tenants; and if any inclosure should hereafter take place, then that one-fourth of what should be so enclosed should be enjoyed by Sir *J. Banks* and his tenants, and the remaining three-fourths should be enjoyed by *John Webb* and his tenants, provided nothing contained in the agreement should prevent either party from inclosing their rateable part. The plaintiff *Banks*, by his bill stated, that the wastes, heaths, and common grounds of the two manors lie undivided, intermixed, and blended together, so that the ancestors of the plaintiff had, time out of mind, and without interruption from the said Sir *J. Webb*, or his ancestors, cut furze, heath, and dug clay, peat, gravel, and sand, depastured their cattle upon any part of the undivided wastes, heaths, and common grounds; and by his bill prayed that the said agreement might be performed and carried into execution, and that he might be quieted in the possession of *Canford Priors*, and of the wastes, heaths, and common grounds thereof; and in case the defendants should controvert the said agreement, and dispute the specific performance thereof, and the Court should not think fit to carry the said agreement into

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execution, that the limits and boundaries of the wastes, heaths, and common grounds, belonging to each of the manors, might be ascertained and that a commission might issue out of the Court for that purpose.

On the part of the plaintiff *Banks*, the agreement which was not executed was produced. The other evidence produced in the causes is stated in the judgment.

Mr. *Brown* and Mr. *Floyer* for the plaintiff *Banks*.

The agreement is not executed in form; but the parties have ever since enjoyed according to the terms of it. The plaintiff submits to the agreement, though the original right would be more beneficial for him.

The agreement has been affirmed, and carried into execution by acts and enjoyment. It may be objected, that Mr. *Webb* was only tenant for life, and could not by his agreement bind the owner of the inheritance. The subsequent acquiescence and enjoyment of the owners of the inheritance have confirmed it. The agreement of an infant submitted to after he comes of age is made good and shall bind him.

If the agreement is out of the way, then we claim one third of *Canford Heath*, as belonging to the manor of *Canford Priors*.

The *Attorney-General*, Mr. *Chute*, Mr. *Noel*, Mr. *Taylor*, Mr. *Murray* and Mr. *Henley*, for the defendants, the *Webbs*.

The family of the *Webbs* have enjoyed *Canford Heath*, as their waste of the manor of *Great Canford*, from the time of the purchase till 1639, when *John Webb* being under prosecution for recusancy, and his estate seised on that account, was influenced to come into that agreement. But *J. Webb* was only tenant for life. No step was taken towards carrying this agreement into execution, unless the grants of part of the waste can be so understood. Many new inclosures made, but no part allotted to the *Banks*', although by the agreement they were to have one-fourth.

The acts of enjoyment, proved by the plaintiff, are only (except the leases) of rights of common, consistent with the ownership of the soil being in another. There are ten leases; four only mention *Canford Heath*; those that mention the waste of *Canford Priors* are not applicable, because there may be other waste belonging to *Canford Priors*.

Such inclosures and leases might be made without the privity or observation of the *Webbs*, or their stewards; but *John Webb* lived till after the year 1656.

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As to the original right claimed by plaintiff at the bar, one third is claimed.

But Sir *J. Banks*, by his own recital, claims only one-fourth. The plaintiff cannot come here for partition, without first establishing his title, or upon confusion of boundaries.

The heath is expressly granted to Sir *J. Webb's* ancestors, or those under whom they claim.

The only evidence of any original right is by the digging peat, and once some stone.

The plaintiff's evidence is in support of a prescriptive right of common, or of estovers, rather than a right of soil.

May 20, 1739. LORD CHANCELLOR: Two bills.

1. The original bill of plaintiff, Mr. *Banks*, founded on a title claimed to some part or share of *Canford Heath*, and praying to establish such title, and to have a commission to set out and settle the boundaries, and to separate and divide his part of the heath from that part which belongs to the manor of *Great Canford*.

2. On the other side, Sir *J. Webb's* cross-bill claims title to the whole of *Canford Heath*, as the waste of his manor, prays to perpetuate the testimony of his witnesses, and to be quieted in the possession of it.

This last bill founded on a mere legal title, proper to perpetuate testimony.

If Sir *J. Webb's* counsel had insisted on any decree upon it, must have directed an issue.

If such an issue tried and found for him difficult to invent, what decree could have been made.

No decree in a court of equity for a perpetual injunction to quiet in possession, on a mere legal title, but after many trials to prevent endless vexation.

But as it is not now insisted on that the Court can make such decree, no colour to direct an issue, or to put it in any method of trial on that bill; but it must be dismissed.

That being laid out of the case, the questions between the parties will arise wholly on Mr. *Banks's* original bill.

This founded on two general heads of equity: put in the alternative.

1. To have a specific performance of an agreement, and under that a commission.

2. If he fails in that, then to have a commission grounded on his general original title to some share or proportion of

Canford Heath, and to have it set out and divided by metes and bounds.

Both these are common equities in this Court, provided a sufficient foundation shewn for it.

1. As to the specific performance of the agreement; it is dated 7th December, 1639, now one hundred years ago.

Many objections made against it.

1. Obtained unfairly, and by undue influence.

Answer. These circumstances rather do induce suspicion: not sufficiently made out to ground a decree of this Court.

I would not be understood in the decree which I shall pronounce, to go upon any foundation that may impeach the honour or character of Sir *J. Banks*.

The strong objections, which I think have received no sufficient answers; are:

1. Agreement of tenant for life could not bind the remainder-man or owner of the inheritance.

2. Rested upon and not carried into execution in all this length of time, 100 years after the making of it. This amounts to a waver.

That alone a sufficient foundation to refuse a decree for a specific performance.

To these it has been answered,

1. That here has been a part performance by the inclosures and leases of part of the heath made by Mr. *John Banks* and Mr. *Ralph Banks*.

Answered. The first of these was in 1648, and the last of them 1656.

Uncertain on what foundation this was done, probably under colour of the agreement.

But on the other side the strength and weight of the evidence is, that it was waived and renounced between the parties.

No fourth part set out.

Multitudes of instances of new inclosures made, new leases granted, and rents reserved, by Sir *John Webb* and his father, to one-fourth of which, if this agreement had been pursued, Mr. *Banks* and his ancestors would have been entitled;—not paid, insisted on, or demanded, in any one instance.

All the other acts of a sole exclusive ownership are evidence to the same purpose.

It was said further that the acquiescence of Sir *J. Webb*, and his ancestors amounted to a submission and an affirm-

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ance of that agreement; but these various repeated acts done in contradiction to it, are abundantly sufficient to overbalance that instance of acquiescence.

No ground after this length of time, and under these circumstances to decree a specific performance.

That kind of relief always in the discretion of the Court on the circumstances of the case.

Second point. In the next place plaintiff resorts to that which has been called his original right.

That, part of the heath is the waste of his manor of *Caxford Prior*; that, he is owner of the soil; that it lies intermixed and confounded with defendant, *Sir John Webb's*, waste of his manor, and therefore entitled to have a commission to set it out.

I take it that whoever comes as a plaintiff into this Court to have a commission to set out and divide lands must do it on one of these grounds:

As claiming,

1st. Some undivided estate as tenant in common or joint-tenant or coparcener with another, or,

2nd, As claiming a several ownership and showing the boundaries to have been confounded or very difficult to be ascertained; or at least that there is a dispute about the boundaries.

I must own that in the course of this cause I have not been able to find out on which of these kind of rights the plaintiff puts his case.

He has not said that he is tenant in common of this waste with *Sir J. Webb*.

Not easy to conceive how that should be in the case of two lords of different manors. At least nothing of that kind is shewn, and the bill, which I have read over rather imports the contrary, prays to establish for ever the precise boundaries.

As to any several ownership of any particular divided part of the heath. No part or spot of ground attempted to be marked out or shewn.

No trace of any boundary whatsoever or pretence to it. I never knew a case in which something of that kind was not pretended to at least.

But upon which soever of these rights a plaintiff, who prays a commission of this nature, founds his case, I am of opinion that it is incumbent upon him to go further and to shew

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1. A title.
2. That he is in possession, or if not,
3. Some impediment why he cannot establish his title at law.

1. As to the title.

1. The agreement being only the acknowledgment of a tenant for life, no evidence of any title in plaintiff against Sir *J. Webb*, the remainderman.

2. The only remaining evidence.

1. The leases from 1648 to 1656, and the digging of peat.

Possession and length of time may have given a title to those, where there has been an enjoyment in contradiction to the lord's title, and rent paid to another lord.

But as to any inference of a title to any other part of the waste, (supposing all fairly transacted) it amounts to very weak evidence when weighed in the balance against the evidence on the other side.

As to the digging peat the slightest that can be.

Might be by indulgence, by a right of common of turbary or estover, as the vicar is admitted to have.

Whatever it was, has not been exercised these thirty years, so no possession of it.

And to this it is no answer or excuse to say that better peat was found at another place.

If plaintiff had this right, it might have been sold, and a profit made of it; and therefore the desisting from digging it there when better was found for his use, shews it rather to be a common of turbary, or estovers to be burnt in his house.

Reputation of one-third most uncertain, inconsistent with the agreement and with the bill.

Discourse at Perambulations. No weight to be laid. The tenants of *Canford Prior* now asserting their own claim, and most probably meant it of a third part of the common rather than of the soil, for the perambulations were for *Great Canford*, and they took in the whole heath into that manor which is inconsistent with a right to a third of the soil.

Let this evidence be compared with that which has been read on the part of Sir *John Webb*.

1. Written evidence, grant and conveyance.

2. By usage and enjoyment.

1. The whole heath conveyed to his ancestor, 9 Jac. 1., by express words, *all that the soil of the great waste in Can-*

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ford aforesaid, containing, by estimation, 10,000 acres, or thereabouts, and all commons and waste grounds. No weight to be laid on the deficiency of acres. The entire thing is granted.

This the stronger, because they were so exact as to except some particular inclosures; reasonable to infer from thence that if only two-thirds or three-fourths of the heath had been intended to be conveyed, it would have been so mentioned.

Nothing of this kind in any conveyance on the other side, only the general word *vasta*, which is in all grants of a manor.

It is highly probable this is the chase described in the inquisition, 4 E. 2.; for in the Court-Roll, 35 Eliz. it is presented by the homage; that all the commons are accounted the lord's waste, within which the inhabitants have common for their cattle, and turf and heath.

The four months to be forborne, unless with consent of the keepers.

That the land was accustomed to have two keepers, and the tenants may keep the deer off their common with a little dog and horn.

These are ordinary privileges of a chase.

2. As to usage and enjoyment.

No act of ownership of the soil that can be exercised by a lord of a manor over his waste, that is not proved to have been exercised by Sir *John Webb* and his ancestors without any interruption.

1. Grants and leases of the soil from the 1 Eliz. down to this day under reserved rents, and those rents received.

2. Inclosures made, and cottages built at pleasure down to this time, some of the witnesses speak within these eight years.

3. Wreck, waifes, and strays, seized and brought home to his manor-house.

4. Deodands seized.

5. Contracts and sales of stone dug publicly on the heath from time to time, and some considerable sums of money received for it.

6. Great quantities of peat dug out of *Portmore* part of the heath by his license, for sale about the country, in one instance, for four years together.

7. Leases of a right of digging clay and sand for making bricks and tiles in great quantities.

8. An account of clay and sand dug on the heath by the

inhabitants of the town of *Poole* kept by Sir *John Webb's* agent, and 2*d.* per load received for it by him.

9. An ancient annual rent of 6*l.* 11*s.* 7*d.* paid by the town of *Poole*, in consideration of their common of turbary, and pasture upon *Canford Heath*; this payable and received by Sir *John Webb*.

As to the reputation of the country, that is rather stronger on the part of the defendant than of the plaintiff, when it is considered how some of the witnesses for the plaintiff, who speak of that reputation, account for it.

But be that as it will, it is of the lightest weight against those plain, express, and clear acts of ownership which are proved, and have never been interrupted on the part of the plaintiff.

No claim of a third or a fourth part of the new inclosures.

No demand of any account of rents received, of the rent from the town of *Poole*, or of the other profits made.

If this had been in instances trifling and not valuable, it might have been less material, but as these profits appear to have been of greater value than usually arise from a waste, it is a strong evidence against the plaintiff's right.

I have observed upon this evidence hitherto as it affects the title and mere right to the soil.

But it shews further that the plaintiff is out of possession of the soil of *Canford Heath*; for as to the proof of depasturing cattle, it proves no possession of the soil, because it is accounted for by a different kind of right, a right of common, which is proved by some of the plaintiff's own witnesses, and admitted by the defendant.

And indeed this seems to be the result upon the whole evidence, that the plaintiff, as lord of the manor of *Canford Priors*, has, by grant or prescription, common of turbary or estovers for himself, and common of pasture for himself and his tenants in the waste of the manor of *Great Canford*.

But I am not to decide the right in all events; I see no impediment why he may not establish his title at law, which in a case of this kind, I think he ought to do before he comes into this Court for a commission.

If he is tenant in common with the defendant of any part of this waste, he may bring an ejectment for any of the new inclosures, and recover his third or fourth, or he may seize a waife or stray, or bring an action against any one for digging stone or clay or peat, by the defendant's license, and this way the title may be tried.

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The relief which is now prayed of this Court, is that I should direct an issue ; but that, the Court ought only to do upon the submission of the parties, or when it is really in doubt.

But in the present case, on the best consideration I can give the evidence, I have no doubt of the right, and therefore ought not to do it.

I do not know what issue to frame.

Therefore Mr. *Banks's* bill must follow the fate of Sir *John Webb's*, and be dismissed.

As to costs, I think there ought to be none on either side. If Sir *John Webb* had contented himself with perpetuating the testimony of his witnesses, as Mr. *Banks* has examined witnesses also on his part, he would have paid no costs, but as he brought his cause to hearing, and can pray no decree, he ought to have paid costs. And as in my opinion, Mr. *Banks* is entitled to no relief, it is equitable to set the costs of one against the other.

Therefore both bills dismissed without costs.

BOYLE and Others v. BOYLE and Another. (1)

and

GRAVES v. BOYLE and Others.

and

NICHOLAS and Others v. BOYLE and Others.

May 19th and 26th, 1739.

1 Atk. 509.

Sir S. Garth
having by his
bond given
5,000*l.* at his

SIR SAMUEL GARTH, - on the 21st of December, 1716, having entered into a bond to leave at his death 5,000*l.* amongst the younger children of *Martha Boyle*, by his death amongst all the younger children of his daughter, by will directs that the rents and profits of his estates should be paid to them until certain periods in his will mentioned, and gives the produce of his personal estate to his daughter for life, and after her death, to pay 1,500*l.* to one of her children, and 3,500*l.* amongst her other younger children, as she shall appoint, and in default of appointment, equally amongst them ; to daughters at eighteen years of age or marriage, to sons at twenty-one ; and declares that the legacies of 1,500*l.* and 3,500*l.* are in full discharge of the bond ; held that a party must elect to claim under the bond or will, but cannot claim under both.

Where a particular thing is given by will in discharge of a demand, and the party insists upon it, he must not only waive that particular thing, but all benefit claimed under the whole will. (2)

(1) The statement of this case is taken from Lord *Hardwicke's* Note-book ; the judgment from *Atkyns*.
(2) See *Noys v. Mordaunt*, 2 Vern.

will of the 27th of May, 1717, devised certain estates to trustees for a term of twenty-one years, if *Henry Boyle* so long lived, upon trust to pay the rents and profits equally amongst all the daughters and younger sons of the said *Martha Boyle*, living at the said testator's death, or born afterwards, till *Henry Boyle* attained his age of eighteen years; and after he had attained that age, then to pay *Henry Boyle* 100*l. per annum*, till his age of twenty-one years, and till such age, to pay and apply the residue of such rents and profits to and amongst *Martha Boyle's* younger sons and daughters equally; and after he attained his age of twenty-one years, or if he died before that age, then the term was to cease, and after the determination or sooner expiration of the said term, he devised the said estates to *Henry Boyle* for life, remainder to his first and other sons, in tail male, remainder to the first and other sons of *Martha Boyle* in tail male, with remainders over; and he gave all his personal estate in trust to pay the interest to *Martha Boyle* for her life, and after her death he gave to *Beaufoy Boyle* 1,500*l.* at her age of eighteen years, or on her marriage; and to and amongst the younger sons and daughters of *Martha Boyle*, 3,500*l.* in such shares as she should appoint, and in default of appointment, then equally amongst all her children, except *Henry Boyle*, to be paid to daughters at eighteen years of age or marriage, to sons at twenty-one, and the said testator declared that the 1,500*l.* and 3,500*l.* legacies were in full discharge of a bond dated the 21st of December, 1716, given to *Henry* and *William Boyle*, in 10,000*l.* penalty for leaving 5,000*l.* amongst *Martha Boyle's* younger children at his death, and he gave all the residue of his estate to *Martha Boyle*.

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581. *Streatfield v. Streatfield*, Ca. temp. Talb. 176. *Kitson v. Kitson*, Prec. in Ch. 351. *Cookes v. Hellier*, 1 Ves. 234. *Boughton v. Boughton*, 2 Ves. 12. *Cull v. Showell*, Amb. 727. *Highway v. Banner*, 1 Bro. C. C. 584. *Lewis v. King*, 2 Bro. C. C. 600. *Hoare v. Barnes*, 3 Bro. C. C. 316. *Finch v. Finch*, 4 Bro. C. C. 38. *Stratton v. Best*, 1 Ves. jun. 285. *Whistler v. Webster*, 2 Ves. jun. 367. *Wilson v. Townsend*, 2 Ves. jun. 693. *Wilson v. Mount*, 3 Ves. 191. *Rutter v. Maclean*, 4 Ves. 531. *Blount v. Bestland*, 5 Ves. 515. *Webb v. Lord Shaftesbury*, 7 Ves. 480. *Moore v. Butler*, 2 Sch. & Lef. 249. *Birmingham v. Kirwan*, 2 Sch. & Lef. 444. *Sheddon v. Goodrich*, 8 Ves. 481. *Rich v. Cockell*, 9 Ves. 369. *Welby v. Welby*, 2 Ves. & Bea. 187. *Green v. Green*, 2 Mer. 86. *Tibbits v. Tibbits*, ib. note 96. *Lord Ranelagh v. Parkyns*, 6 Dow. 150. *Dillon v. Parker*, 1 Swan. 359. *Gretton v. Haward*, ib. 409. Whether forfeiture or compensation be the effect of an election to take against an instrument; see Mr. *Swanston's* learned note upon this subject in *Gretton v. Haward*, 1 Swan. 433.

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The first mentioned cause was a re-hearing and appeal from a decree of the *Master of the Rolls*, who had decreed (the bond of Sir *Samuel Garth* not being put in issue in that cause) that *Martha Boyle* should receive the interest of the 5,000*l.* for her life; that after her death the 5,000*l.* should be paid amongst the children, according to the directions in Sir *Samuel Garth's* will, and that a certain part of the profits of the testator's real estate should be placed out at interest for the benefit of *Elizabeth Graves*.

The bond was deposited by the testator, for safe custody, in the hands of Mrs. *Martha Boyle*, who admitted by her answer, that she had cancelled the bond, apprehending that it was of no use after the will was made.

Elizabeth Boyle having intermarried with *Matthew Graves*, *Harriott Boyle* with *William Nicholas*, and *Beaufoy Boyle* with *John Wilder*, being the daughters, and *Robert Boyle* being a younger son of *Martha Boyle*, claimed to be entitled to a share both of the 5,000*l.* under the bond, and of the rents and profits devised to them by the will of Sir *Samuel Garth*.

The *Attorney-General*, Mr. *Chute*, Mr. *Browne*, and Mr. *Pilsworth*, for *Graves* and his wife.

Mr. *Noel*, Mr. *Fenwick*, and Mr. *Wilbraham*, for *Martha Boyle* and Sir *J. Rushout*.

Mr. *Booth* and Mr. *Green*, for *Nicholas* and his wife, and *Robert Boyle*.

Mr. *Floyer* for *Wilder* and his wife.

May 26, 1739. LORD CHANCELLOR at the hearing of the cause had declared, that the plaintiff *Elizabeth Graves*, might choose to claim either under the will, or under the bond, but if she claimed under the bond, she must take no benefit at all under the will; but next day conceiving a doubt, on account of the devise being of a real estate, and the bond being a personal debt, gave orders to be attended with precedents, and this day delivered his opinion in support of his former decree, and mentioned the case of *Jenkins v. Jenkins*, Nov. 5th, 1736, before Lord *Talbot*, as a case in point, where a particular thing was given in discharge of a demand, the party insisted on his demand, it was decreed he should waive not only that particular thing, but all benefit which he claimed under the whole will. The case of *Shepherd v. Philips*, at the Rolls, Dec. the 15th, 1738, was determined on a similar point. But at the same time the *Chancellor* took notice, that in the present case the devise was expressed

to be in satisfaction of the bond, and when he gave orders to be attended with precedents, declared, he would not extend the construction of devises in satisfaction, further than they had already gone.

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The following note appears in Lord *Hardwicke's* notebook: "Decree varied as to the interest of plaintiff *Graves* and his wife's share of the 5,000*l.*, and also as to their share of the profits of the testator's real estate, which being only given by the will, plaintiff *Graves* and his wife ought not to have, in respect of their claiming the 5,000*l.* under the bond in contradiction to the will: afterwards conceived some doubt as to excluding plaintiffs from their share of the profits of the real estate; but satisfied on search of precedents, particularly in the case of *Jenkins v. Jenkins*, (1) and affirmed the directions.

(1) The following case of *Jenkins v. Jenkins*, is taken from Lord *Hardwicke's* papers, being corrected by Lord *Hardwicke* in his own hand-writing:—

"20th November, 1736. On appeal from the Rolls, case was *David Lewis* by will, in 1699, gave to his grand-daughter *Ann Jenkins*, 300*l.* to be paid her within five years after his death, and to his other four grand-children 200*l.* a-piece (whereof plaintiff is one) to be paid them within five years after his death, and no interest to the time of payment, and in case either of the said children should die before time of payment, his or her legacy should go amongst the other brothers and sisters of the whole blood, share and share alike, and made his son-in-law, *Thomas Jenkins*, executor, and died.

Ann Jenkins, the grand-daughter died within five years after the testator, and after the death of *Ann*, and before the five years expired, defendant another grandchild was born.

Thomas Jenkins, the executor, laid out for plaintiff, his eldest son, 110*l.* to put him out apprentice, and maintained him in his infancy.

In 1731, *Thomas Jenkins*, made his will, and devised amongst other things, in these words: "Whereas, I am executor to my late father *David*

Lewis, who by his will gave my son *Thomas Jenkins* 200*l.* and there being also due to him, on the death of his late sister, *Ann Jenkins* 50*l.*, which I am by the said will obliged to pay, I do therefore, in discharge of my said executorship, and out of affection to my said son give him the said 250*l.* notwithstanding, I paid him 110*l.* to put him apprentice, and maintained him; and I give the interest of the said 250*l.*, to my executor (his other son defendant) in satisfaction of the money I have so disbursed for my son *Thomas*;" and in another part of the will gives his son *Thomas* (plaintiff) a debt due to him the testator from one *Prince* about 100*l.* and a close of land to *Thomas* and his heirs worth about 45*l.* and made (defendant) *Benjamin Jenkins*, executor and residuary legatee.

Plaintiff, *Thomas Jenkins*, brought his bill, and 10th of February, 1735, *Master of the Rolls* of opinion and decreed that defendant who was born after the death of the testator *Lewis*, and before the said legacy of 300*l.* became payable, was entitled to an equal share thereof with the other children of *Eleanor Jenkins*, and that plaintiff was entitled to interest for his share thereof being the sum of 50*l.* and for his said legacy of 200*l.* as well

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His Lordship directed the decree of the *Master of the Rolls*, to be varied and declared that the plaintiff *Graves* and his wife electing to claim by virtue of the said bond, contrary to the disposition made by Sir *Samuel Garth's* will, ought not to take any benefit by the devise of the rents and profits of the real estate, and he decreed upon the evidence in the cause that the sum of 5,000*l.* arising from the said bond be equally divided amongst all the younger children of *Martha Boyle*, whether born before or after the death of Sir *Samuel Garth*. (2)

as to the principal sums, and that he was likewise entitled to the land and money devised by his father's will.

Defendant appealed and insisted first that plaintiff ought to abide by the will throughout and ought not to insist upon the 250*l.* as a debt, and the 250*l.* and other legacies when it is expressly declared by the will that it was intended by testator in satisfaction, and defendant's counsel cited the case of *Noys v. Mordaunt*, 2 Vern. 581. 2ndly, That plaintiff ought to allow for the 110*l.* and maintenance.

Lord Chancellor. As to the first point plaintiff must abide by the will *in toto* or not at all, according to the case of *Noys v. Mordaunt*. A difference was then offered, where a personal legacy is only given in satisfaction of a personal demand, and where lands besides are given as in this case. But by *Lord Chancellor*, *non allocatur*, for the intent of the testator is entire, and the whole is his will and must be submitted to entirely or not at all. And therefore he decreed plaintiff to have five weeks to make his election whether to abide by the will or not; and

plaintiff afterwards electing not to abide by the will, he was decreed to have satisfaction for the legacy of 200*l.* and 50*l.* his share of his sister *Ann's* legacy under the will of *David Lewis*, with interest at 5*l. per cent.* from five years after *David Lewis's* death, and to convey to the defendant the close of land devised to him the plaintiff by his father's will and to account for the profits he had received. As to the other point about the maintenance; in regard this 250*l.* was all the provision plaintiff had who was the eldest son, and the father as was proved had an estate in land about 240*l. per annum* and 5,000*l.* in money and as was proved by one witness had declared he would pay the plaintiff the interest for his 250*l.*; his Lordship thought it too hard in such case for his father or his executor to deduct the interest of the 250*l.* which was but 12*l. 10s. per annum*, and therefore interest was decreed to be paid for the 250*l.* for five years after the death of testator, *David Lewis*.

(2) Reg. Lib. A. 1738. fo. 602.

GLOVER v. BATES. (1)

June 2nd, 1739.

By articles before marriage 22nd May, 1716, *William Bates* covenanted to settle a leasehold estate upon his intended wife, and by will or deed to leave her 1,000*l.*, and it was thereby declared that the provision mentioned in the articles should be in full satisfaction and recompence of and for all dower, or thirds, parts, or shares, and right, title, or claim of dower which she might have or claim to have in or to any of the estate of the said *William Bates* real or personal by the common law of this realm or custom of the city of *London*, or any other law custom or usage whatsoever.

1 Atk. 439

In articles before marriage it was declared that the provision thereby made should be in full satisfaction and recompence of and for all dower, or thirds, parts, or shares, and

right, title, or claim of dower, which the wife might have to any of the real or personal estate of the husband by the common law custom of the city of *London* or any other law custom or usage whatsoever; the wife being an infant when she signed the articles had her election at her husband's death, which she made by accepting since his death the provision secured to her by the articles.

Bridget Glover, who was then an infant, intermarried with *William Bates* and survived him, and *William Bates* by his will gives his wife all his household goods, diamonds, and plate, and to other persons several specific legacies; but makes no disposition of the residue of his estate.

Bridget Glover, who survived her husband some years, accepted the provision made for her by the articles, and died intestate, and the plaintiff as her personal representative brings her bill against the personal representatives of *William Bates* for the share of the residue of his personal estate to which his wife was entitled at his death.

Mr. *Chute* and Mr. *Cay*, for the plaintiff.

The wife is clearly entitled to her share of the surplus of her husband's estate unless she is barred by her marriage articles. This case differs from all other cases as we do not claim in opposition to any disposition made by the husband of his estate.

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from *Atkyns*.

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Mr. *Attorney-General*, for the defendant.

The wife entered upon the leasehold estate and accepted the 1,000*l.* provided for her by the marriage articles, as she was an infant at the time of the marriage, she might make her election; and she has in fact elected by her acceptance.

Then if she has accepted the articles what is the intent and construction of the articles. The words could not have been stronger unless she had been barred from any benefit arising under the statute of distributions; but she is barred from claiming under any law, and the statute of Distributions is a law. On the custom of *London*, if the wife be barred, the estate is divided, as if there were no wife at all. In *Badcock v. Lovell*, 25th October, 1726, and *Pitt and Leigh*, coram *Cowper*, C., where a wife was to have no benefit by the custom of *London*, or otherwise, the words or otherwise held to bar the distributive share, and he likewise cited *Davila v. Davila*, 2 Vern. 724, and *Lockyer v. Savage*, 2 Str. 947.

June 2, 1739.

LORD CHANCELLOR. The first question is, if the wife is bound by these articles.

This demand of the wife (if she had in her life demanded it), though not properly the subject matter of a release, yet may certainly be extinguished by agreement; she was an infant at the time of entering into this agreement, therefore at the death of the husband, she had her election, and she has made it by accepting what was designed by the articles as a satisfaction, which plainly shews her sense of the articles.

The words in the articles, any law, usage or custom notwithstanding, extend to the husband's personal estate, and bar the wife of her share under the statute of distributions.

The next question is, if upon the construction of this agreement it can extend to bar her distributory share? And it is objected that this proviso was only to leave the estate in the power of the husband to dispose of, in case he had made a will, and so this claim not inconsistent; and indeed, with respect to the custom of *London*, it generally is thus understood; but where such express words are used as here, *any law, usage or custom notwithstanding*, it is plain he intended his estate should go to his relations, exclusive of any claim of his wife, and as she must claim under the statute of Distributions, which is a law, it is expressly provided against.

His Lordship therefore ordered the plaintiff's bill to stand dismissed with costs according to the course of the Court.

SMITH and Others Plaintiffs; (1)
and

LOW and Others Defendants.

AND

BRIDGET LOW and SAMUEL LOW, }
Executors of SAMUEL LOW . . . } Plaintiffs;
and

All the other Parties Defendants.

June 26th, 1739.

RICHARD LLOYD devised certain cottages, and a fulling mill and all the streams of water belonging thereto, to his six children, and their heirs, equally to be divided between them. *Elizabeth Lloyd*, the widow of the testator *Richard Lloyd*, intermarried with *Samuel Low*, and by indenture of the first October 1704, and made between *Samuel Low*, and *Elizabeth* his wife who was the guardian to the children and executrix of *Richard Lloyd* deceased of the first part, *Richard Lloyd* the eldest son of the second part, and *John Atkinson* deceased of the third part, the said *Samuel Low*, *Elizabeth* his wife, and *Richard Lloyd* demised to the said *John Atkinson* all the before mentioned premises for a term of forty-one years, to commence from the 25th March 1708, yielding yearly to the said *Samuel Low* and his assigns, for so much of the term as he should live, to and for the use of all the said children 25*l. per annum*, payable half-yearly, and after *Samuel Low's* death during the remainder of the said term, to the said *Elizabeth* her heirs and assigns, or to such other person as should be the lawful owner of the premises, the like rent above all taxes, and all other payments whatsoever; and *Atkinson* covenants to keep the premises in repair; and there was a covenant from *Samuel Low*, *Elizabeth* his wife, and *Richard Lloyd* for quiet enjoyment. *Richard Lloyd* the eldest son at the time of granting the lease was

1 Atk. 489.

Richard Lloyd devised some cottages and a mill to his six children; the mother as guardian of the children and the eldest son demised the premises for forty-one years; they all attained twenty-one, and accepted the rent for ten years after the youngest came of age, and then brought an ejectment against the persons claiming under the lessee;

Under the circumstances of the lease being beneficial to the family, and of the long acquiescence of the parties; The Court decreed the lease to be established during the term.

residue of the

(1) This case is taken from Lord *Hardwicke's* note book. The premises in question were not let upon a

building lease, as Mr. *Atkyns* has stated in his report of this case.

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nineteen years of age, and the rent was paid to the children up to the year 1733, ten years after the youngest child came of age.

The testator *Richard Lloyd* died greatly indebted, and in very bad circumstances, and the mill at the time of the lease was in a ruinous condition. *Atkinson* laid out 232*l.* upon the mill, and converted the fulling mill into a rape mill. *Atkinson*, in December 1712, assigned the mill to *Neville*, for 225*l.* and at a rent of 25*l. per annum.*

Two of the children of the testator having died, their shares in the premises descended upon their eldest brother *Richard*, and *Richard* having died, three-sixth parts of the premises descended upon his eldest son *Richard*.

There was evidence in the cause to shew that the premises in question were worth 60*l. per annum*, and that they were much out of repair, and would cost 50*l.* and upwards to put them into a proper state of repair. *Richard Lloyd* and the surviving children of the testator brought an ejectment against the plaintiffs, representatives of *John Atkinson*, and the representative of *Neville*, and the plaintiffs brought their bill for the purpose of establishing and confirming the lease, or that the executors of the said *Samuel Low*, might make satisfaction out of the assets of *Samuel Low* deceased for being evicted on the foot of the covenants; and *Bridget Low* and *Samuel Low* brought a cross bill to compel a confirmation of the lease and to indemnify them against the same.

Mr. Chute for the plaintiffs in the original bill.

Mr. Attorney-General for the plaintiff *Low*. 1st, he insists that this lease is binding on the defendants, the infants. 2ndly, If not, and the plaintiff in the original cause receives satisfaction on the foot of our covenants, we are entitled to be indemnified by the children for whom we became sureties.

1st, The acceptance of rent by *Richard* is a confirmation of the lease by him as to his part, and so it is as to the two-sixths, descended to him afterwards, and he having joined in a lease by indenture, it is an estoppel; as to the other children, it is a confirmation of an agreement in equity by them after they came of age.

Mr. Brown and Mr. Noel for the defendant *Lloyd* and the children.

The houses were at the time of the lease worth between

25l. and 30l. *per annum*. These premises were not let at half their value, and *Atkinson* had plain notice of the title. There was no occasion for so long a term. There was nothing of building in the lease, only the common covenants. In point of law no rent was reserved to *Richard Lloyd*, so the lease was not made for his benefit; as to the two-sixths nothing passed from him. Then the only consideration is in equity, and the court will not decree relief, where the agreement is unreasonable, and not for the benefit of the infant; an abuse of this trust is likewise a reason for not establishing it, for the tenements are now out of repair.

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LORD CHANCELLOR. First question on the original bill, June 26, 1739. whether this lease ought to be established in a court of equity, if not, the plaintiffs are clearly entitled to satisfaction out of the assets of *Samuel Low*.

2. If so, on the cross bill, whether the plaintiffs in that suit are entitled to be indemnified. If the first question be decided in favour of the plaintiffs, it puts all the other questions out of the case. First, it was insisted, that it was good in law for *Richard Lloyd's* share, and good in equity as to the whole; as to *Richard Lloyd's* share not very material, whether it is good in law, for the plaintiff by coming into equity, admits it to be void in law; but it is clearly not good in law as to the two parts descended to him, from his brothers *Henry* and *William*, though doubtful as to the other. But the equitable relief against him is quite clear. 2nd question, whether it is good in equity for the whole.

1st, It is a lease for a valuable consideration. 2nd. It was beneficial for the family, the father greatly indebted and died in bad circumstances, the cottages were in tolerable repair at the time of the lease, but the mill was in a ruinous condition, and a considerable sum was laid out by the lessee in the repair of the mill; but then it was objected that the

An infant bound in this court by a marriage contract, where a marriage is made with the consent of guardians. (1)

(1) The agreements of female infants by their guardians or themselves in consideration of marriage, are binding in respect of their personal property. *Harvey v. Ashley*, 3 Atk. 607. *Williams v. Chitty*, 3 Ves. 545. *Ainslie v. Medlycott*, 9 Ves. 19. but it seems doubtful whether female infants can be bound by their marriage con-

tract, as to real estate, see *Cannel v. Buckle*, 2 P. Wms. 244. *Harvey v. Ashley*, 3 Atk. 607. *Williams v. Williams*, 1 Bro. C. C. 152. *Caruthers v. Caruthers*, 4 Bro. C. C. 500. *Lucy v. Moor*, 3 Bro. P. C. 514. *Clough v. Clough*, 5 Ves. 717. *Milner v. Lord Harewood*, 18 Ves. 275. *Lechy v. Knox*, 1 Ba. and Be. 210.

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original lessee was reimbursed by his assignment to *Neville*; but *Neville* must stand in the place of the original lessee. 3rd. Acceptance of rent for a great number of years, affirms the agreements.

There are several cases where this Court binds infants to contracts made on their behalf, as marriage contracts where infants are married with the consent of guardians.

Then it is objected, that the defendants might not know, the terms of the lease, and that they might have received the rent as from a tenant at will; but the plaintiffs being in possession was notice to them, and it must be presumed that they knew it. It was sufficient notice to put them upon enquiry. The proceeding at law is contrary to conscience especially after so long an acquiescence.

His Lordship therefore declared that the plaintiff, under the circumstances of the case, is entitled to have the lease established during the residue of the term, and decreed accordingly, and he decreed that they pay the rent and put and keep the said premises in repair according to the said lease; and as it was against conscience to bring ejectments after these transactions, ordered that the plaintiff should have costs at law, and in equity. And it was ordered that the said cross cause do stand dismissed without costs. (1)

(1) Reg. Lib. B. 1738. fo. 475.

CHARLES SHEFFIELD *v.* The DUCHESS of
BUCKINGHAM and Others. (1)

On Exception to the Master's Report.

June 30, 1739.

THE Duke of *Buckingham* by his will dated the 9th of August, 1716, after the payment of certain legacies therein mentioned, gave the whole of his real and personal estate to trustees, upon trust for his only son, *Edmund*, and his issue; and in case he died without issue, upon the like trusts, for *Charles Sheffield*; and in case he died without issue, in like manner, to *Charlotte* and *Sophia Sheffield*.

The Duke of *Buckingham* devised his real and personal estate to trustees, upon trust for his only son, *Edmund*, and his issue; and in case he died without issue,

upon the like trust for *Charles Sheffield*; and in case he died without issue, in like manner to *Charlotte* and *Sophia Sheffield*.

In Easter Term, 1721, Duke *Edmund* instituted a suit against the trustees and executors of his father's will, *Charles Sheffield*, *Sophia* and *Charlotte Sheffield*, for an account of the rents and profits of the estates devised by his father's will, and an allowance thereout for maintenance.

In the July following, another suit was instituted by *Charles Sheffield*, *Sophia* and *Charlotte Sheffield*, against Duke *Edmund* and the trustees and executors under the will, for carrying into execution the trusts of the will; and by a decree made in both causes, it was declared, that the will was well proved, and that the trusts ought to be carried into execution.

On the 30th October, 1735, Duke *Edmund* died an infant.

On the 13th March, 1735, the suit was revived by *Charles Sheffield*, against *Charlotte* and *Sophia Sheffield*, and their husbands, the same having become abated by their marriages.

And on the 8th May, 1736, the decree made in both causes was signed and enrolled.—Held, though Duke *Edmund* was dead at the time of the enrollment of the decree, and before the suit had been revived against his heirs at law, that the enrollment was regular, there being material parties living at the time of the enrollment of the decree.

In Easter Term, 1721, Duke *Edmund* having survived his father, instituted a suit against The Duchess of *Buckingham*, *Charles Sheffield*, the trustees and executors, and *Sophia Sheffield* and *Charlotte Sheffield*, for an account of the rents and profits of the estates devised by his father's will, and an allowance out of the estate for maintenance.

In the July following, another suit was instituted by *Charles Sheffield*, *Sophia Sheffield*, and *Charlotte Sheffield*, against *Edmund*, Duke of *Buckingham*, the Duchess of *Buckingham*, and the trustees and executors under the will, for the purpose of carrying into execution the trusts of the will.

On the 22nd December, 1721, by a decree made in

(1) This case is taken from Lord *Hardwicke's* Note-book.

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both causes, it was declared that the will was well proved, and that the trusts thereof ought to be performed and carried into execution.

On the 30th October, 1735, Duke *Edmund* died, before he had attained the age of 21 years.

The suit having become abated by the marriage of *Sophia Sheffield* with *Joseph Cox*, and of *Charlotte Sheffield* with *John Walker*, on a bill of revivor filed by *Charles Sheffield*, in the month of February, 1735, against the Duchess of *Buckingham* and the surviving trustees and executors, and the said *Joseph Cox* and *Sophia* his wife, and *John Walker* and *Charlotte* his wife, an order was made on the 13th March, 1735, that the suit should stand revived against them.

On the 8th of May, 1736, the decree made in both causes was signed and enrolled.

On the 28th of June, 1736, Lord *Mountjoy*, Sir *Digby Legard*, *Thomas Worsley*, *Thomas Fairfax*, *John Shafto*, *Thomas Dawson*, and *Walter Walsh*, claiming to be heirs at law of both the Dukes, exhibited their bill against the Duchess of *Buckingham*, *Charles Sheffield*, *Joseph Cox* and his wife, *John Walker* and his wife, and the surviving trustees and executors under the Duke's will, for a discovery of the estates of the said late Duke, and other purposes therein mentioned. *Charles Sheffield* put in his answer, insisting on the said decree, and that the same was enrolled, and that the plaintiffs were bound by such decree.

By an order of the 18th December, 1736, the said *Charles Sheffield* amended his bill of revivor, by making the heirs at law of both Dukes defendants thereto, and by an order of the 27th of May, 1737, an order was made for reviving the suit against them.

On the 16th January, 1737, Lord *Mountjoy*, and the other persons claiming to be heirs at law of both the Dukes, presented a petition to the *Chancellor*, insisting, that as the decree in both causes was enrolled whilst both the said causes were abated, they were not bound thereby, and praying that they might be at liberty to amend the bill brought in the name of the infant, or bring a new bill, or put in a new answer to the cross-bill, instead of the said infant's answer, or to amend the same.

On the petition coming on to be heard, the *Lord Chancellor* referred it to the Master, to see whether the said decree was regularly signed and enrolled; and the Master by

his report, certified that it appearing that the order of the 8th of May, 1736, for signing and enrolling the said decree, *nunc pro tunc*, was made in two causes, in one of which the said infant Duke was mentioned to be plaintiff, and in the other defendant, although he was then dead, and before the said suit was revived against the defendants, his heirs at law, therefore he conceived that the said decree was not regularly signed and enrolled.

Exceptions being taken to the Master's report, the same came on to be argued.

The *Attorney-General*, Mr. Noel, Mr. Hamilton, and Mr. Ord, for Mr. Sheffield.

It is not necessary that all parties should be living at the time of the enrollment of the decree. By the report, the Master seems to lay some weight on the suit being described in the order for enrollment, with the name of the Duke Edmund as a defendant thereto, when he was dead. But that is a proper description: it could not be described in any other manner, otherwise no order could possibly be made in a suit before revivor.

The rule of the Court is to enroll within six months; but that of course dispensed with, and orders are made to enroll *nunc pro tunc*. So orders to revive in a certain time, otherwise injunctions to be dissolved; and orders for a *subpœna scire facias*.

The enrollment of a decree is a ministerial act done by the clerk of the Court. There can be but one enrollment, and that cannot be good against one, and bad against another. No notice is given to any person of the signing and enrolling a decree; it is the decree which has the effect. It is as much a *lis pendens* without enrollment, as with it. There is no difference between enrolling a decree in this Court, and entering a judgment at common law.

Admitting the contrary doctrine, would be productive of bad consequences; for in a decree of dismissal, a defendant cannot revive, and it would be very strange if he could not enroll it, so as to enable him to plead it, if plaintiff should die. This point determined in *Yeavely v. Yeavely*, 3 Ch. Rep. 25. 41. *Anon.* 2 Ch. Ca. 227. *Slingsby v. Hale*, 1 Ch. Ca. 122.

Decrees are constantly entered after abatement by death of parties, then, why should they not be enrolled?

Mr. Chute, Mr. Bootle, Mr. Idle, Mr. Wilbraham, and Mr. Murray, for Lord Mountjoy and others.

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None of the precedents come up to this case. As to the case of *Yeaveley v. Yeaveley*, it was first sent to be tried at law, and afterwards the Court was attended with precedents. The question there was not whether the enrollment was or was not regular, but whether it was error for which the decree should be reversed. As to the cases of entering orders after the parties' death, orders are supposed to be entered in Court on the day on which they are pronounced. But in the cases of signing and enrolling, there is a day mentioned in the docquet. The general rule of the Court is, that no decree shall be enrolled after six months, without special leave of the Court. Three of the clerks in Court declare that they have always taken the practice of the Court to be, that after the death of a material party, the decree cannot be signed and enrolled against that party, and they have known bills of revivor brought for that purpose.

July 4, 1739.

LORD CHANCELLOR. After hearing several of the clerks in Court, most of whom that were heard this day, certified that they thought that the enrollment was regular. I argued the case at large, and delivered my opinion, that the enrollment was regular, and that the authorities produced supported it; and that it was like the case of entering up a judgment at law after the death of the party, on the Roll. I took notice, that here were material parties living at the time of the enrollment, so that the cause was still in Court; that it was agreed to be regular as to the parties surviving, and I know no instance of two enrollments of the same decree."

Exception allowed, and petition dismissed.

WIGGE v. WIGGE. (1)

July 2nd, 1739.

EDWARD WIGGE, by will dated the 18th of November, 1710, devises to his second son, *Thomas Wigge*, and his heirs, certain lands, upon condition to pay 6*l.* 10*s.*, which he had agreed to pay the wife of *Thomas* on her marriage, in lieu of dower, with power of distress; and upon this further condition, to pay to particular grandchildren 45*l.* to be divided amongst them; and on this further condition, to pay amongst his six other grandchildren (the children of *Thomas*) 90*l.*, to be equally divided amongst them; and in default of payment, then that they might enter, hold, and enjoy the premises.

*E. W. devises to his second son Thomas Wigge, and his heirs, certain lands, upon condition to pay to his grandchildren (the children of the said Thomas) 90*l.* to be equally divided amongst them, and on default of payment, then that they might enter, hold, and enjoy the premises. Thomas died in the testator's lifetime; the son of the eldest son of the testator entered on the lands as heir at law, and sold them. The legacy to the children of Thomas, the testator's second son, is a continuing charge on the lands in the hands of the purchaser, and they are entitled to be satisfied for the same with interest.*(2)

Thomas the devisee died in the lifetime of the testator; the son of the eldest son of the testator entered on the lands as heir at law, and sold the lands to a purchaser for a valuable consideration, who had notice of the will after the payment of his purchase-money, but before the execution of his conveyances.

Three of the legatees bring their bill against *Edward Wigge* the grandson, and heir at law of the testator, and against the purchaser of the estate, for payment of their legacies out of the estate charged with the payment of them.

Mr. Attorney-General, *Mr. Lloyd*, and *Mr. Smart*, for the plaintiffs. Defendant, the purchaser, insists that this sum of 90*l.* is no charge upon the estate, but the devisee dying in the lifetime of the testator, it became lapsed; it is admitted that the devise is lapsed, but still the charges on the es-

(1) This case (with the exception of the will and some additions to the arguments of counsel, which are taken from *Lord Hardwicke's Note-book*) is taken from *Atkyns*; the judgment in

Atkyns corresponds with *Lord Hardwicke's* minutes of the decree.

(2) So *Hills v. Wirley*, 2 *Atk.* 605. *Oke v. Heath*, 1 *Ves.* 136.

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tate will subsist. A devise to a trustee in trust for *J. S.* trustee dies in the life of the testator, the devise of the trust is good, *Prec. in Cha. 602. Northcote v. Underhill*, 1 Salk. 199.

Mr. Browne, Mr. Noel, and Mr. Owen, who were counsel for the defendants, insisted, that this was only a personal condition on *Thomas*, the devisee, and his heirs, there being no words in the will to give a legacy to his children, otherwise than depending on such personal condition, and that where a person claims under a will, but claims nothing except under an estate given by that will to another person, if such estate did never arise (as here it never did), nothing intended to be annexed to it can survive, that this was an estate given upon express terms of condition, and not within the rules of being construed a conditional limitation, as not being to be performed by him who could receive a benefit from the non-performance, and that as it is not limited over, it ought to be construed strictly, as being to disinherit an heir at law, and that the beneficial interest cannot be separated from the condition, but they must both stand and fall together; and relied principally on the case in *Dyer's Reps. 348. : (1)* and they insisted, that the plaintiffs ought not to come into this court, but ought to take their remedy at law; that the plaintiffs were mere volunteers; that if there was no remedy at law, they ought not to come into this court to make it good; it was like supplying the defective surrender of a copyhold in favour of a grandchild. The defendant, the purchaser, insisted that the sum of 90*l.* was no charge upon the estate,

(1) A man having no issue, devises certain tenements in *London* to two of his friends in fee, to hold in common, upon condition that they and their heirs should pay an annual rent of 7*l.* 6*s.* 8*d.* out of the said tenements, at four quarter-days, to the wife of the devisor during her life; and that if the rent should be in arrear, by the space of six weeks after any of the days of payment, (and lawfully demanded), that it should be lawful for his wife to distrain upon the tenements. The rent is in arrear, and no demand made upon the tenements by the wife; and for that cause, the heir of the devisor entered, and the question upon a special verdict in ejectment was, if his entry

was lawful, or whether the penalty of the express condition annexed to the estate of the devisees be qualified, and altogether destroyed by the penalty of the distress, and by that means a limitation of payment of the rent to the wife, and the heir to take no advantage of the breach of the condition. The majority of the Judges clearly of opinion, that the entry of the heir was lawful; and that both the penalties, (that is to say), the condition and re-entry, and the distress given to the wife for non-payment, are good remedies, and sureties for the firm payment of the rent to the wife, according to the intent of the husband.

But the devisee dying in the lifetime of the testator, it lapsed.

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LORD CHANCELLOR :—I think the plaintiffs have a strong case, both for their legacies and interest. There are three questions.

First, If the plaintiffs have any continuing charge on the lands.

Secondly, If they are proper to come into this Court.

Thirdly, If there is sufficient notice to affect the purchaser.

The two first depend on the will, and a great deal arises from the nature of the disposition in favour of the plaintiffs. It manifestly appears, that the testator intended not only to make a provision for *Thomas* and his heirs, but also to make a provision for the six children who were then in being ; and it would be very unfortunate, if not only *Thomas's* heirs should lose the benefit intended, but the six children also lose their small provision by the act of *God* ; and this is such a construction as the court never will make but when necessitated to do it. But on the contrary the present is a case so circumstanced, as will induce a court of law, as well as equity, to make as strong a construction as possible to support such a charge.

The defendants insist, that this is only a condition annexed to the estate of *Thomas*, and his estate not taking effect, is void.

But this is not a mere condition, but a conditional limitation, there being an express limitation, that in case of non-payment, the legatees were to enter, hold and enjoy, and they have an interest in the nature of tenants by *elegit* ; and there are many nice distinctions on these conditions, arising by wills. *A.* devises lands to *B.*, on condition to pay *C.* a sum of money, and no clause of entry ; this is no charge on the estate, to give the legatee of the money a lien on the lands ; but if the heir at law enters, and takes advantage of the breach of the condition, in this Court he shall be considered only as a trustee for the legatees.

A. devises lands to *B.*, on condition to pay *C.* a sum of money, and no clause of entry ; the legatees at law have no lien on the lands, but if the heir of testator enters for a breach of the condition, in this Court, is but a trustee for the legatees. (1)

But then the question will be, as *Thomas* died in the testator's lifetime, and the estate descended to the heir at law, if the charges continue on the lands ?

I think it is the same thing ; whoever entered, it was to be only till the payment of the legacy, and the heir at law might in this Court redeem them ; but the Court will not

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A man by will may make an equitable as well as a legal charge on his estate, and this Court will maintain it against the heir at law.

put the legatees to such a circuitry, but permit them to bring a bill to have the lands sold, and the money raised.

This has been compared to a defective surrender of a copyhold pursuant to a will; but here it is different, for there the will is void; but sure a man may, by will, make an equitable as well as a legal charge on his estate, and this Court will maintain it against the heir at law, and therefore the children are entitled.

As to the second question, *whether the remedy is proper in this Court?* it is consequential, from what has been laid down before, to prevent circuitry.

As to the third question, *of notice to the purchaser*, it appears he had notice; for though he had no notice before he paid his purchase money, yet he had notice before the execution of the conveyance, and it is all but one transaction.

Though a purchaser did not know of an incumbrance before he paid his money, yet he knew it before the deed was executed, it affects him, with notice.(1)

I do therefore declare that the plaintiffs are entitled to the sum of 45*l.* being one moiety of the sum of 90*l.* charged by the testator's will on his estate with interest for the same, to be raised out of the estate. Let an account be taken of what is due to the plaintiffs for the 45*l.*, with interest for their respective shares from the time the plaintiffs' *Anne, Sarah, and Edward Wigge* attained their ages of twenty-one; and in case the defendants shall not pay unto the plaintiffs what shall be so found due, then I direct the estate, or a sufficient part thereof to be sold, and out of the money arising by such sale, the plaintiffs to be paid what the master shall certify to be due, and the residue of the money arising by such sale to be paid to the purchaser; but this, without prejudice to any remedy, he may have against the defendant, the heir at law, to be indemnified under the covenant in the purchase deed.

(1) See *Tourville v. Naish*, 3 P. Wms. 306.

GUNTER v. HALSEY. (1)

July 4th, 1739.

THIS bill was brought for a specific performance of an agreement for sale of lands and houses, which was by parol, but reduced into writing by a person present, but never signed by the parties.

Amb. 580.
Hawkins v. Holmes, 1 P. Wms. 770.
Equity will decree performance.

ance of parol agreements, if it is admitted in the answer, or if material and unequivocal acts have been done in part performance.

The defendant insisted on the statute of frauds, and there was evidence of facts to prove a part performance.

LORD CHANCELLOR, in this case, said, the rule for agreements by the statute, was very plain; but that since the statute, this Court has, by construction, laid down some rules by way of exception to it, and will in some cases decree a performance, though the requisites of the statute are not observed.

As where the agreement is parol, and admitted by the answer, because here it is out of the mischief of the statute; so when there has been material acts done in part performance.

Foxgrave v. Lyster.

But the general rule of those cases has been, where the acts have been such as would be a prejudice to the party who has done them, if after that the agreement was to be void.

And in all those cases where the ground of the decree has been part performance, the terms of the agreement must be certainly proved.

Then he went into the particular circumstances of this case, and as to the certainty of agreement he thought it was not certainly proved, by reason there were queries in the margin, though no proof who made them.

As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement; and said, in this case it did not appear but that the acts done by the defendant might be done with other views. (2)

Dismiss bill, but without costs.

(1) This case is taken from *Ambler*; it corresponds with Lord *Hardwicke's* note of the same case.

(2) Lord *Hardwicke* has added the following note:—

“ The bill dismissed, because uncertain from whence the agreement was to commence, and that the acts done by the defendant were not shewn to be in pursuance of the agreement.”

SHEFFIELD v. DUCHESS OF BUCKINGHAM. (1)

July 4th and 6th, 1789.

Bills of review of two kinds, one for error apparent on the face of the decree, and of course on a deposit of 50*l*, the other discretionary, upon matter existing before, but come to the knowledge of the party subsequent to making the decree, and is granted upon petition or affidavit.

LORD MOUNTJOY and others being the heirs at law of *Edmund*, the late Duke of *Buckingham*, presented a petition for a bill of review with new matter. The circumstances of this case not sufficient either in point of form or upon the merits, to grant a petition for a bill of review.

And in order to support such a petition, the affidavit of the solicitor to the heirs at law of the infant tenant in tail, that he or the heirs at law had no knowledge of the matter before the decree, is not sufficient; the only question is, whether the infant tenant in tail or his guardians or agents had no knowledge of such matter existing before the decree.

The petition was founded upon the following suggestions :

1st. That there was error in the former decree, because no day was given to the infant Duke to shew cause against the decree when he came of age.

2dly. That the will was established on the examination of but two of the witnesses ; and the third, though supposed to be dead, was in fact alive, in parts beyond the seas, and is since come into *England*.

3dly. That in Duke *John's* will, established by the decree, there were several rasures and obliterations, which if made, as it was contended they were, after the will, were a revocation of the will, and that this came to their knowledge since the decree, and the solicitor for the heirs at law made an affidavit that he did not know of such rasures and obliterations before the decree.

Mr. *Chute*, Mr. *Bootle*, Mr. *Wilbraham*, Mr. *Idle*, and Mr. *Murray*, for the heirs at law.

No day is given to the infant to shew cause against this decree. In the case of Lady *Effingham*, in the House of Lords, a day was given to the infant to shew cause against the decree. Four trustees are first written upon the will, then by a rasure five are named. Unless the legal estate be properly devised to the trustees, no trust can arise upon it. This amounts to a revocation, for an estate cannot be revoked

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* note-book ; the judgment from a manuscript report of Mr. *Forrester's*.

as to two joint tenants, and stand as to the others without a new execution of the will. But then it is objected that the affidavit is not made by the parties, that rule only applies when a bill of review is brought by the same parties; it does not extend to privies in representation.

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Mr. *Attorney-General*, Mr. *Noel*, Mr. *Hamilton*, and Mr. *Ord*, for the defendant.

1st Objection. That no day is given to the infant to shew cause; no occasion to apply to the Court for leave to bring such a bill of review. Petitioners may do it without leave, but there is no rule for a day for an infant to shew cause on his own bill.

2d Objection. That new matter has been discovered since the decree.

It must be new matter of fact discovered since the decree.

The will and codicils were read and produced, and the rasures must have appeared. It is not material whether they know the consequence of law. The case of an infant not different from adults; for if it were otherwise, the representatives of an infant might bring bills of review *in infinitum*.

Supposing the rasures to be made after the execution of the will, and no person has sworn that they so much as believe that the rasures were made after the will was executed; yet an alteration of the trustees' names cannot revoke the trust. But then it is said that this decree passed by consent, which is construed to be by collusion. This objection would disturb many decrees made for the quiet of families.

LORD CHANCELLOR.—I think that neither in point of July 6th, 1739. form, or on the merits, the petitioners can have a bill of review.

Bills of review are of two kinds.

The one in nature of a writ of error, *coram vobis*, for error apparent on the face of the decree, and this is of course on making a deposit of 50*l*.

The other, which is now an established proceeding, though not of course, but discretionary, and is upon matter which though existing before the decree yet came to the parties knowledge since, and this is on petition and affidavit that it did so and must appear to be such matter as will overturn the decree or doubtful.

This kind of proceeding was first in Lord *Bacon's* time, and was disputed so late as in Lord *Harcourt's*, and is taken from the courts of the civil law.

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The present application is for a bill of this last kind, for the first there is no occasion for an application to the Court.

Let us consider then the grounds of it.

As to the first that no day is given.

This, if it is error, is error on the face of the record; therefore may be taken advantage of without such a bill of review as this is.

And it is a new doctrine to me, that on a bill to have the trusts of the will only performed, to have a day given when the infant is plaintiff, and the decree is according to the prayer of the bill.

The case of *Lady Effingham* and Sir *J. Napier*, in the House of Lords, is the only case, and the reason the Lords went on there was, that it was for relief on a kind of fraud, and it was to convey the infant's estate. It was therefore a very particular case, and not to be argued from.

And let this decree be founded on which bill it will, no conveyance of the real estate is directed, and I take it to be the course of the Court not to give day, unless a conveyance is directed either in form or substance.

As to the other two grounds, there is not the least evidence that the matter has come to knowledge since the decree.

For the affidavit is made by the solicitor, and not by the parties, and even their knowledge is not material, for the question is whether Duke *Edmund*, or his guardians or agents knew of it, for as to his representative's knowledge, that must be a ground in every case, for they were not then before the Court, nor at all concerned.

But it is objected that he was an infant at that time, and died before he came of age, and an infant is not presumed to know any thing.

But if that was so, the consequence will be, that in every case where an infant is concerned, there may be a bill of review, and though an infant is not presumed to know, yet the knowledge of his guardians or *prochein amy* is his. And if there is any collusion in them, it is a ground for a relief of another kind. As to the witnesses not being examined, it is said all the witnesses must be examined to prove a will, and that is a general rule, but then there is a deposition that the witness was dead, or out of the process of the Court.

I lay the death out of the case, and certainly a will proved by two witnesses and another out of the process of the Court, is a sufficient proof, and there is nothing laid before me to shew that the depositions were false.

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And as to the objections to the will itself.

The Court will do all it can to support such a will as this.

It is all under the testator's own hand; therefore one should expect almost demonstration to overturn it, and one would never presume against it.

How then can it be proved these rasures were after the execution?

For as to the rasures and mistake of the trustees.

They were trustees in the will, as mentioned in the codicil, to some purposes, though not of the estate; viz. guardians of his children.

And when he made the codicil he might not recollect the will as to them how it stood, and the codicil will be a republication of the will.

And therefore if the rasures were made after the execution of the will, and before the execution of the codicil, still the will would be good.

And can any one believe any jury would make any such presumptions as these to overturn such a will.

But if the rasures were made after execution both of the will and codicil; unless the rasures were made *animo revocandi*, it would not hurt it.

For though the statute of Frauds speaks of revocations by rasure, obliterations, &c., yet it is not every rasure that is a revocation; and at most they are revocations *pro tanto*.

And the case, 2d Vern., of the cancelled will is a much stronger case.

I think, therefore, this is neither sufficient knowledge, or matter shewn to support the petition.

As to its being a cause by consent, and the same solicitor on both sides, that is a strange reason, and would be very mischievous, and in causes by consent it often is so.

And if there was any fraud or collusion in any party, in obtaining this decree, that is not proper matter for a bill of review, but for an original bill grounded on the fraud.

Richmond and Taneur by Lord *Macclesfield*; when infant came of age, brought an original bill to set aside a decree, obtained by collusion in a cause by consent during his minority; but fraud is not error, and will annul the proceedings of courts of justice, as well as any other transactions.

Petition dismissed.

SANDERS v. SANDERS.

MARY SANDERS Plaintiff; (1)
and
THOMAS SANDERS and Others . . . Defendants.

CROSS CAUSE:

THOMAS SANDERS Plaintiff;
and
MARY SANDERS and Others . . . Defendants.

July 9th, 1739.

J. S. devises certain estates to trustees upon trust for his grandson, John Sanders, for life, with remainder to his first and other sons in tail male, with like remainders to his grandson, Thomas Sanders, and he de-

*clared that as his grandsons should come to be in possession of the estates, they might make a jointure for his or their wives respectively, not exceeding 100*l.* per annum for every 1,000*l.*, and he directed his personal estate to be applied by his executors in purchasing lands to be settled to the same uses as his real estate.*

*John Sanders, the grandson, enters on the estate upon the death of his grandfather, and by articles covenants that his wife shall have as her jointure certain specified parts of the estates, amounting in the whole to 320*l.* per annum, in consideration of 3,200*l.* for marriage portion, 3,000*l.* of which her mother covenants to pay to John Sanders, in addition to the 200*l.* he had already received, with interest in the mean time, with a power of revocation to John Sanders and Jane Bailey. John Sanders dies, having in his lifetime received 1,700*l.* in part payment of the portion, and having purchased certain real estate: held, that the power of giving the jointure of 320*l.* per annum, was well executed by way of covenant or agreement; (2) but that the deficiency in value, the estates on jointure not amounting to the 320*l.* per annum, was not to be made good against the remainder man; and that the purchase of the real estate could not be considered as a purchase in performance of the trust, there being no proof that the purchase was made out of the personal estate of the grandfather, or in performance of the trust.*

(1) The statement of this case and the arguments of counsel are taken from Lord Hardwicke's Note-book; the judgment from a manuscript report of Mr. Forrester's.

(2) So *Coventry v. Coventry*, 2 P.

Wms. 222. *Francis's Maxims*, last case, Gilb. Eq. Rep. 160. *Alford v. Alford*, cited in 2 P. Wms. 230; and see *Saint Paul v. Lord Dudley and Ward*, 15 Ves. 172.

in tail male; and for want of such issue, in trust for his grandson, *Thomas Sanders*, for life, with remainder to his first and other sons, in like manner, successively, in tail male; and it was provided and declared, that the testator's will and meaning was, that his said grandsons, and their heirs, as they should respectively come to be in the actual possession of the said premises, or any part thereof, by virtue of the limitations therein contained, might make a jointure or jointures, for his or their wives respectively, not exceeding 100*l.* *per ann.* for every 1,000*l.*, and so proportionably for every greater or less sum; and he ordered that his ready money, and securities for money, except what is therein excepted, with his corn, cattle, and stock on the ground, should be applied by his executors for purchasing of lands, and to settle the same to such uses as his real estate was limited and appointed.

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In November, 1727, the testator died, and immediately upon his death, his grandson, *John Sanders*, entered into the possession of the estates, and received the rents and profits, and applied them to his own use, and continued in the possession of the estates, and the rents and profits thereof until his death.

In the year 1721, *John Sanders*, the grandson, intermarried with the plaintiff *Mary Sanders*; and on the 1st of October, 1733, articles were entered into, whereby the said *John Sanders* covenanted and agreed that the plaintiff, *Mary Sanders*, in consideration of 3,200*l.*, her marriage portion, should have and enjoy as her jointure, in pursuance of the power given by his said late grandfather's will, certain specified premises in the articles mentioned, not including all the premises mentioned in the will, amounting in the whole to 320*l.* *per annum*; and *Jane Bailey*, the mother of *Mary Sanders*, covenanted that she would pay to the said *John Sanders*, his executors and administrators, 3,000*l.* above the 200*l.* he had then received, making up 3,200*l.*; and *Jane Bailey* covenanted, until payment of the said sum of 3,200*l.* she would pay 4 *per cent.* for every 100*l.* that should remain in her hands for interest; and there was a power reserved to *John Sanders* and *Jane Bailey* to revoke the covenant for the payment of the portion.

Under a decree, dated the 4th of December, 1735, made in an original cause instituted by the grandson, *John Sanders*, on the 13th of June, 1729, against the parties interested

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under his grandfather's will, to have the trusts of his grandfather's will performed, and to have a jointure settled upon his wife according to the articles, and pursuant to his power under his grandfather's will, and which was afterwards revived against *Mary Sanders* and *Jane Bailey*, it was referred to the Master to settle a proper conveyance according to the directions contained in the will of the grandfather, wherein a power was to be inserted to give to the plaintiff a power of making a jointure according to the direction contained in the will; and it was referred to the Master to see what portion the said *John Sanders* had or was to have with his wife *Mary Sanders*, and that a proper settlement should be made upon the said *Mary Sanders* out of the said trust estate.

The said *John Sanders*, the grandson, having died on the 18th March, 1735, the suit was revived by *Mary Sanders* for the purpose of carrying into execution the said decree, and that she might have the benefit of the said articles; and if the said tenements therein mentioned were not of the yearly value of 320*l.*, as in the articles expressed, then that the deficiency might be supplied out of the estate of the grandfather, *John Sanders*.

Jane Bailey had only paid, in the lifetime of the grandson, *John Sanders*, 1,700*l.* in part of the 3,200*l.* mentioned in the articles; but she submitted to pay the remainder upon a jointure of 320*l.* being secured to her daughter.

Thomas Sanders, by a cross bill, set up various claims against the estate of *John Sanders* the grandson, and amongst others, that the said *John Sanders* had laid out his grandfather's money, and the produce of his securities, chattels and stock in the purchase of an estate which he insisted ought to be conveyed to him.

The estate had been purchased by *John* the grandson, but no proof was given that it was paid for out of the personal estate of the grandfather.

The *Attorney-General*, Mr. *Lloyd*, Mr. *Wilbraham*, and Mr. *Ford* for plaintiff, *Mary Sanders*.

The first objection to *Mary Sanders* being entitled to her jointure is, that the portion covenanted to be paid by her mother was not paid either before or at the execution of the articles, but money, *bond fide*, secured to be paid, is the same as paid. If the compact is fair, and the money covenanted to be paid, and interest in the mean time, then it is considered that the portion is paid from that time. *Mary*

Sanders is likewise entitled under the articles, if it turns out that the premises are not worth 320*l. per annum*, to have the deficiency in value made up out of the other estates comprised in the will of the grandfather. The statement in the articles that the lands therein mentioned are of the value of 320*l. per annum*, amounts to an agreement that they should be of that value, *Lady Clifford v. Lord Burlington*, 2 Vern. 379.

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Mr. *Chute* and Mr. *Talbot* for the younger grandchildren of the testator contended, that the grandchildren were entitled to have the sum of 1,500*l.* raised out of the rents and profits of the estate charged therewith by the testator's will, and they cited *Smith v. Smith*, 1 Eq. Ca. Ab. 267. pl. 5.

Mr. *Browne*, Mr. *Capper*, Mr. *Murray*, and Mr. *Yorke* for *Thomas Sanders*.

The jointure was not good for the lands specified in the articles. The terms of the power were not pursued. Two things were necessary; 1st. A marriage portion; and 2dly, It must be had and received. There are circumstances of fraud, a power of revocation contained in the articles by which the covenant to pay the portion might be revoked. Plaintiff has no right to have the deficiency of her jointure made good. There is no covenant in the articles that the lands were of the value of 320*l. per annum*. As to the case of *Lady Clifford* and *Lord Burlington*, it differs from this case. Particular lands were not specified in the covenant. The charge of 1,500*l.* for the grandchildren cannot be carried further than the term of four years from the decease of the testator.

The case of *Smith v. Smith* was decided upon circumstances of fraud.

The grandson has purchased land as we say, with the personal estate of the grandfather directed to be laid out in land; and then these lands ought to be settled according to the will. The Court will presume the land was purchased with the grandfather's personal estate; and they cited *Lechmere v. Lechmere*, 3 P. Wms. 211.

The *Attorney-General* in reply.

The reference to the Master shews there was no fraud intended. The power of revocation could not in any way injure the remainder-man. As to the deficiency, it was the plain agreement of the trustees that the jointure should be 320*l. per annum*. This case is stronger than the case of

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Lady *Clifford* and Lord *Burlington*, for the covenant there was to settle 1,000*l.* *per annum* without reference to the power. In the case of *Lechmere v. Lechmere*, the Court took it to be the intention of Lord *Lechmere* to purchase for that purpose.

Between July
9 and 18, 1739.

LORD CHANCELLOR. In this case there were three points: 1st was; where an estate was limited to trustees to raise portions for children for a term of four years, remainder to *A.* for life, remainder to *B.* in fee, if *A.* receives all the profits during his life, and the trustees let the term elapse without raising the money; *A.* dies insolvent, and question was, whether the children for whose benefit the trust term was created have any right to have the money raised on the lands, as against *B.*, the remainder-man?

And to prove they had, *Smith v. Smith*, in Eq. Ca. Ab. and in 2 Vern. 178. was cited.

Second question was, where there was a power in tenant for life to make a jointure on any wife he should marry not exceeding 100*l.* *per annum* for every 1,000*l.* *bond fide* had and received as a marriage portion with such wife, and he did not receive any portion at the time of such marriage; but the power being executed after the marriage in consideration of a portion part in hand paid, and the rest covenanted to be paid by the wife's mother, whether this was a good execution of this power?

Third question was, person receives trust-money which, by the trust, he was to lay out in lands; he purchases lands, but there was no proof that he intended this purchase should be in performance of the trust, or that it was done with the trust-money: question, whether the Court will consider this as the trust-estate? and it was said that this is different from where such a purchase is a breach of trust, for there the land will not be liable, because a breach of trust is a personal lien, and like a simple contract debt; and *Lechmere v. Lechmere* was cited to prove that the Court would intend it done in execution of the trust.

These points arise, some on the original bill, and some on the cross bill. That on original bill is with relation to the jointure made in pursuance of the power which depends on the construction of a power, and the execution of it, which power is on an equitable, not a legal estate.

And it is executed by way of covenant, which since the case of *Coventry and Coventry* is good by way of agreement

or covenant, though no direct appointment made, and that case was stronger, because it was there of a legal power and estate.

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It would be too strict a construction of such a power to say the portion must be paid at the time of the marriage, and I think such a portion might be paid by any body, and at any time, and it will be a good consideration, and it is the same thing to the remainder-man, Vide *Holt* and *Holt*, 2 P. Wms. 648.

It is said this would extend it to any fortuitous sum of money that came to the wife, which would defeat the intent of such a power.

But even in that case, if it was such an interest as the husband could not be entitled to, and get into his hands, unless he made a settlement, I think it would be a good portion, though perhaps it would be otherwise if the husband would be at all events entitled to the money; for then as to the remainderman, the jointure might be considered as voluntary.

Objected, That as to part, it was never paid.

But I think that will not alter the case; for as it was covenanted to be paid, it must in equity be considered as if actually paid; for part is paid, and she is liable to pay the rest.

And if there was any fraud or collusion in the covenant, as if the party who covenanted was insolvent it would be another thing, and it cannot be construed so briefly as that the husband must actually receive it himself.

Case of *Lady Clifford* and *Lord Burlington*, 2 Vern. 379., (1) I have often heard quoted, and always treated as no authority; and it was a cause by consent.

As to the question on the trust-money, and the relief against the remainder-man.

The children are not exactly in the same case, as if the trustees had entered and misapplied, for then the estate had been clearly exonerated against *A.* and *B.*, but now they have clearly a remedy against *A.*'s representatives, vide 1 Salk. 153.

But I doubt much how they can have any remedy against *B.* the remainder-man, for here the provision made for the portions is a term only, and that expired.

As to the case of *Smith* and *Smith*, which comes nearest,

(1) See *Evelyn v. Evelyn*, 2 P. Wms. 668. and *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 542.

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that decree, was founded on the fraud. Sir *T.* was tenant in tail, and a fine was levied, by which he became tenant in fee; and perhaps had he continued tenant in tail, the decree had not been as it was. But being tenant in fee, his charge descended on the estate, and the defendant claimed as his heir in privity under him, and not as issue in tail.

Here is no fraud that can affect the remainder-man, and I cannot see how that case came to be compared to Sir *Andrew Corbet's* case, in Co., for it is not the least like it.

But I will give no opinion till I see how the assets of *A.* turn out.

As to the 3d question: I can see no grounds how they can be considered as the trust-estate.

It is a tender point, to say money can be followed into lands.

Leckmere's case was quite different, for he himself had covenanted to lay out the money, and that depended on the proofs in the cause of his intent.

If there was any proof that the very money was applied from any circumstances, it might be otherwise.

It appears by the decree in the Register's-book, that Lord *Hardwicke* declared, that the plaintiff, *Mary Sanders*, was entitled to have the lands particularly specified in the articles of the 1st October, 1733, settled on her by way of jointure; but his Lordship declared "that he was of opinion, that *Mary Sanders* was not entitled to have any deficiency in point of value in the said lands directed to be settled, made good against the remainder-man."

And his Lordship "reserved the consideration, whether the 1,500*l.* should be made good out of the real estate of the grandfather; and his Lordship ordered the Master to take an account of what was due from the defendant, *Jane Bailey*, for the said sum of 1,500*l.* and interest, at the rate of 4 *per cent.* from the date of the said articles of the 1st October, 1733, and what should be found due was to be paid by her." (1)

(1) Reg. Lib. B. 1738. f. 485.

CALVERT v. SAUNDERS.

JOHN CALVERT and SUSAN his Wife,
and MARY WHITHALL } Plaintiffs; (1)
and

Dame ANN SAUNDERS, THOMAS RE-
VELL and JANE his Wife, SETH, JE-
REMY, and ANNA MARIA EGER-
TON, HENRIETTA EGERTON and
ANNE EGERTON, (representing and
claiming under Sir GEORGE SAUN-
DERS,) ROBERT PROOF, ROBERT
ROSE, WILLIAM DODD, THOMAS
DART and SHADRACH VINCENT,
(claiming under MARY PROOF,) JAMES
COLBY, who claims to be sole Heir of
Sir THOMAS COLBY, GILBERT
KNOWLER, Dr. WILLIAM KNOW-
LER, GILBERT BOUCHERY, Exe-
cutors of GILBERT KNOWLER,
FRANCIS POWELL and ELIZABETH
BOUCHERY, SARAH BOUCHERY
and ROBERT KNOWLER, (claiming
under GILBERT KNOWLER) . . . } Defendants.

July 18th and 19th, 1739.

THE plaintiff, *Susan Calvert*, then *Susan Whithall*, *Mary Whithall*, *Robert Proof* and *Mary* his wife, on the 19th January, 1729, filed their bill against *F. Apsley*, the administrator of *Sir Thomas Colby*, deceased, *Thomas Bullock*, *Sir George Saunders*, *James Colby*, and *William Warrington*, setting forth, that in 1729 the said *Sir Thomas Colby* died, without issue, possessed of real estate, which de-

Perpetual in-
junction de-
creed against a
defendant from
proceeding a-
gainst plain-
tiffs, to reco-
ver, in eject-
ment, posses-
sion of premi-
ses, the right
to which had

been established against him upon a trial at bar, and upon a decree made in both the causes (to one of which he was a party) for giving effect to the verdict; though he insisted by his answer that many witnesses had not been examined, and an entry in a Registry-book not produced at the trial at bar, through the neglect of his attorney; but it appeared likewise in the cause, that there were strong grounds for believing that an entry in the Registry book, to prove his title, was forged by his procurement. And it is no objection to the plaintiffs' instituting a suit against the defendant for a perpetual injunction, that they were only co-defendants with him in that suit to which he was a party.

(1) This case is taken from Lord *Hardwicke's* Note-book.

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scended upon them, as his heirs at law ; and praying that the said defendants might set forth their respective titles, that they might be restrained from setting up any terms for years, or other incumbrances ; and that the plaintiffs' title to the real estate might be established. All the defendants appeared to the bill, except *James Colby*, who denied that he had been served with a *subpœna*.

Interrogatories were filed in the cause in the Examiner's Office, for the examination of witnesses against *James Colby*.

In Hilary Term, 1729, Sir *George Saunders* filed his bill against the said *F. Apsley*, *Robert Proof* and his wife, the said *Susan* and *Mary Whithall*, and the said *James Colby*, praying a discovery of the titles of the said defendants. To which bill the defendant, *James Colby*, and the other defendants, appeared and answered ; and the said *James Colby*, by his answer, insisted that he was descended from *James Colby*, who was one of the brothers of *Philip Colby*, the father of the said Sir *Thomas Colby* ; and witnesses being examined on both sides, both causes came on to be heard together, before the *Master of the Rolls*, in the presence of counsel, both for the said *James Colby* and other parties, when it was ordered, that the parties should proceed to a trial at bar, wherein *Robert Proof* and *Mary* his wife, and *Susan Whithall* and *Mary Whithall* were to be plaintiffs ; and Sir *George Saunders*, *F. Apsley*, *Thomas Bullock*, and *James Colby* were to be defendants, upon this issue, whether the said *Mary Proof*, *Susan* and *Mary Whithall*, were the sole heirs of the said Sir *Thomas Colby*, on the part of the father, or not ; and if the jury should find that they were not, then they were to enquire whether Sir *George Saunders* was sole heir of the said Sir *Thomas Colby*, or not ; and if they were to find that neither of them were sole heirs, then they were to enquire whether they were joint-heirs of the said Sir *Thomas Colby*, and if they found that they were neither sole or joint-heirs, then they were to enquire whether *James Colby* was the sole heir of the said Sir *Thomas Colby*, on the part of the father, or not. At the trial, the parties to the issue, and particularly *James Colby*, appeared by counsel, and two witnesses were examined on his part, and the jury found that Sir *George Saunders*, *Mary Proof*, and *Susan* and *Mary Whithall*, were the co-heirs of Sir *Thomas Colby*, on the part of the father ; and that Sir *George Saunders* was entitled to a moiety, *Mary Proof* to

in tail male; and for want of such issue, in trust for his grandson, *Thomas Sanders*, for life, with remainder to his first and other sons, in like manner, successively, in tail male; and it was provided and declared, that the testator's will and meaning was, that his said grandsons, and their heirs, as they should respectively come to be in the actual possession of the said premises, or any part thereof, by virtue of the limitations therein contained, might make a jointure or jointures, for his or their wives respectively, not exceeding 100*l.* *per ann.* for every 1,000*l.*, and so proportionably for every greater or less sum; and he ordered that his ready money, and securities for money, except what is therein excepted, with his corn, cattle, and stock on the ground, should be applied by his executors for purchasing of lands, and to settle the same to such uses as his real estate was limited and appointed.

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In November, 1727, the testator died, and immediately upon his death, his grandson, *John Sanders*, entered into the possession of the estates, and received the rents and profits, and applied them to his own use, and continued in the possession of the estates, and the rents and profits thereof until his death.

In the year 1721, *John Sanders*, the grandson, intermarried with the plaintiff *Mary Sanders*; and on the 1st of October, 1733, articles were entered into, whereby the said *John Sanders* covenanted and agreed that the plaintiff, *Mary Sanders*, in consideration of 3,200*l.*, her marriage portion, should have and enjoy as her jointure, in pursuance of the power given by his said late grandfather's will, certain specified premises in the articles mentioned, not including all the premises mentioned in the will, amounting in the whole to 320*l.* *per annum*; and *Jane Bailey*, the mother of *Mary Sanders*, covenanted that she would pay to the said *John Sanders*, his executors and administrators, 3,000*l.* above the 200*l.* he had then received, making up 3,200*l.*; and *Jane Bailey* covenanted, until payment of the said sum of 3,200*l.* she would pay 4 *per cent.* for every 100*l.* that should remain in her hands for interest; and there was a power reserved to *John Sanders* and *Jane Bailey* to revoke the covenant for the payment of the portion.

Under a decree, dated the 4th of December, 1735, made in an original cause instituted by the grandson, *John Sanders*, on the 13th of June, 1729, against the parties interested

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duty, and neglecting to examine several material witnesses for him, which was the reason he failed in the trial. That the pedigree under which he claimed his right to the estate in question was as follows: that *Philip Colby*, late of *Kensington*, yeoman of the guards, and grandfather of *Sir Thomas Colby*, had issue four sons, *Thomas*, *Philip*, *James*, and *Samuel*, which said *Thomas* and *Samuel* died without issue as he has heard; but the said *Philip* intermarried with *Elizabeth Lewellin*, and they had issue *Sir Thomas Colby*; that the said *James Colby*, the other of the said sons of the said *Philip Colby*, and brother of *Sir Thomas Colby*, intermarried with *Beatrice Harrison*, by whom he had issue him the defendant; and he said, that he had not, since the trial at bar, found out or made any discovery of any new or further evidence of his title and pedigree.

On the hearing of the cause the registry-book of the births and burials of the parish of *St. Peter, in the East*, in *Oxford*, was produced, in which there was an entry stating *James Colby* to be the son of *Philip Colby*. There were strong grounds for believing, from the proofs in the cause that the entry was forged by the procurement of *James Colby*.

Mr. Browne, for the plaintiffs.

1st. To carry on the former decrees is of course.

2nd. We pray a perpetual injunction.

A final decree has been made establishing the title and for dividing the estate between proper parties; the defendant *James Colby* was a party to the issue and final decree.

Forgery appears in this case. New examinations are dangerous. In *Coton and Lutterel*,⁽¹⁾ tampering and ill practices allowed as a reason against directing an issue; but *James Colby* objects that he had not an opportunity of examining all his witnesses four of which he names and three of those he has not examined now.

If he had not an opportunity of examining all his witnesses he should have applied for a new trial.

But still he objects that one verdict should not bind his right.

That is frequently done on an issue directed.

In *Acherly v. Vernon* perpetual injunction decreed.

Mr. Chute, *Mr. Bootle*, *Mr. Murray*, and *Mr. Comyns*, for the defendant, *James Colby*.

The defendant *James Colby* was not a party in the cause

(1) Ante page 438.

Sanders is likewise entitled under the articles, if it turns out that the premises are not worth 320*l. per annum*, to have the deficiency in value made up out of the other estates comprised in the will of the grandfather. The statement in the articles that the lands therein mentioned are of the value of 320*l. per annum*, amounts to an agreement that they should be of that value, *Lady Clifford v. Lord Burlington*, 2 Vern. 379.

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Mr. *Chute* and Mr. *Talbot* for the younger grandchildren of the testator contended, that the grandchildren were entitled to have the sum of 1,500*l.* raised out of the rents and profits of the estate charged therewith by the testator's will, and they cited *Smith v. Smith*, 1 Eq. Ca. Ab. 267. pl. 5.

Mr. *Browne*, Mr. *Capper*, Mr. *Murray*, and Mr. *Yorke* for *Thomas Sanders*.

The jointure was not good for the lands specified in the articles. The terms of the power were not pursued. Two things were necessary; 1st. A marriage portion; and 2dly, It must be had and received. There are circumstances of fraud, a power of revocation contained in the articles by which the covenant to pay the portion might be revoked. Plaintiff has no right to have the deficiency of her jointure made good. There is no covenant in the articles that the lands were of the value of 320*l. per annum*. As to the case of *Lady Clifford* and *Lord Burlington*, it differs from this case. Particular lands were not specified in the covenant. The charge of 1,500*l.* for the grandchildren cannot be carried further than the term of four years from the decease of the testator.

The case of *Smith v. Smith* was decided upon circumstances of fraud.

The grandson has purchased land as we say, with the personal estate of the grandfather directed to be laid out in land; and then these lands ought to be settled according to the will. The Court will presume the land was purchased with the grandfather's personal estate; and they cited *Lechmere v. Lechmere*. 3 P. Wms. 211.

The *Attorney-General* in reply.

The reference to the Master shews there was no fraud intended. The power of revocation could not in any way injure the remainder-man. As to the deficiency, it was the plain agreement of the trustees that the jointure should be 320*l. per annum*. This case is stronger than the case of

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Knowler, or the defendants claiming under them be performed and paid to and by the plaintiffs and defendants in this cause, except by defendant *James Colby*, respectively; and as between plaintiffs and defendant, *James Colby*, it is ordered and declared that the injunction already granted for stay of defendant's, *James Colby's*, proceedings at law for the matters in the said bill complained of be made perpetual. And that the said defendant, *James Colby*, be restrained from proceeding at law against the defendant, *Lady Saunders*, and the other defendants, who claim under the said Sir *George Saunders*, and against the defendant *Robert Proof*, and the other defendants claiming under the said *Mary Proof*, to recover the estate in question or any part thereof. And it appearing to the Court from the proofs in the cause that there are strong grounds to believe that there is a forgery in making an entry in the registry book of *St. Peter's*, in *Oxford*, committed by *Benjamin Cuile*, by the procurement of the defendant, *James Colby*; his Lordship recommended it to the plaintiffs and defendants, the representatives of Sir *George Saunders*, *G. Knowler*, and *Mary Proof*, to prosecute the defendant *James Colby* and *Benjamin Cuile*, for the forgery committed in the registry book of the parish of *St. Peter's in the East*, in *Oxford*.

And it is ordered that the registry books do stay in the hands of the register of this court, until the further order of this Court. (1)

(1) Reg. Lib. A. 1738. fo. 658.

or covenant, though no direct appointment made, and that case was stronger, because it was there of a legal power and estate.

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SANDERS.

It would be too strict a construction of such a power to say the portion must be paid at the time of the marriage, and I think such a portion might be paid by any body, and at any time, and it will be a good consideration, and it is the same thing to the remainder-man, Vide *Holt* and *Holt*, 2 P. Wms. 648.

It is said this would extend it to any fortuitous sum of money that came to the wife, which would defeat the intent of such a power.

But even in that case, if it was such an interest as the husband could not be entitled to, and get into his hands, unless he made a settlement, I think it would be a good portion, though perhaps it would be otherwise if the husband would be at all events entitled to the money; for then as to the remainderman, the jointure might be considered as voluntary.

Objected, That as to part, it was never paid.

But I think that will not alter the case; for as it was covenanted to be paid, it must in equity be considered as if actually paid; for part is paid, and she is liable to pay the rest.

And if there was any fraud or collusion in the covenant, as if the party who covenanted was insolvent it would be another thing, and it cannot be construed so briefly as that the husband must actually receive it himself.

Case of *Lady Clifford* and *Lord Burlington*, 2 Vern. 379., (1) I have often heard quoted, and always treated as no authority; and it was a cause by consent.

As to the question on the trust-money, and the relief against the remainder-man.

The children are not exactly in the same case, as if the trustees had entered and misapplied, for then the estate had been clearly exonerated against *A.* and *B.*, but now they have clearly a remedy against *A.*'s representatives, vide *1 Salik*. 153.

But I doubt much how they can have any remedy against *B.* the remainder-man, for here the provision made for the portions is a term only, and that expired.

As to the case of *Smith* and *Smith*, which comes nearest,

(1) See *Evelyn v. Evelyn*, 2 P. Wms. 668. and *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 542.

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Provided that my said message in or near Lincoln's Inn Fields, (which was a freehold) shall in the first place be charged with the said gross sums charged on the premises given to *Godfrey Clarke*, his heirs, executors, and administrators.

Lady Craven died on the 12th of March, 1733.

Thomas Lewis, the trustee, died in the lifetime of the testatrix.

Mary Lewis died 5th of June, 1734.

And this was a bill brought by the plaintiff as administrator of *Mary Lewis* against *Godfrey Clarke*, the representative of *Godfrey Clarke*, named in the will for the payment of this legacy of 2,000*l*.

Mr. *Browne* for the plaintiff.

Mr. *Noel* and Mr. *Murray*, for the defendant.

In mere personal legacies there is a difference allowed between a legacy given at a certain time and given absolutely to be paid at a certain time. But that difference is not allowed where the legacies are charged upon real estates. *Powlet v. Powlet*, 2 Vent. 366. *Yates v. Phettiplace*, 2 Vern. 416. *Carter v. Bletsoe*, 2 Vern. 616. Suppose this had been given merely out of personal estate, it would not have been vested; for here the day is annexed to the substance of the legacy.

There are no words of bequest to the trustee but by the direction to pay, and that is within a year and a half, and the *cestui que trust* died before that time.

Mr. *Browne* in reply.

If this were a legacy out of land merely, the rule of the Court would be too hard for us; but this legacy is given out of real and personal estate, and we have no occasion to resort to the real estate, but can take satisfaction out of the personal estate. In *Yates v. Phettiplace*, 2 Vern. 416, the real estate was directly sought to be charged. In the Duke of *Chandos v. Talbot*, 2 P. Wms. 604. *Jennings and Looks*, 2 P. Wms. 276., it was held, that if the personal estate is sufficient, the legacy should be paid.

In *Wilson v. Spencer*, 3 P. Wms. 172, there was a charge on the real estate, if the personal estate insufficient; the legatee died within the time prescribed for raising the legacy, and it was decreed to be raised.

In *Whaley v. Cox*, decided at the Rolls, 8th March, 1736, *J. S.* makes his will as follows:

"I give and bequeath unto *Richard Plumer* 300*l*., to be

paid within three years after my decease, in trust to put the same out at interest, and to pay the interest and profit thereof to my niece *Whaley* for her separate use during her life, and after her decease I give 200*l.* thereof to her son *Thomas Whaley*, and the other 100*l.* to her son *Charles*." Mrs. *Whaley* and *Thomas Whaley* both died within the three years, and yet the *Master of the Rolls* decreed that the whole money should be paid to the trustee who was living, and that the 200*l.* should go to the representative of *Thomas*. It was charged upon both funds, but it was admitted that the personal estate was sufficient.

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LORD CHANCELLOR. The general rules are certain.

July 21, 1739.

1st. Where a legacy is given out of the personal estate only to a person at a particular time, and interest not given in the mean time, the legacy does not vest if the legatee dies before the time of payment; and if such legacy is given to a person at a certain time, and interest to be paid in the mean time, it is transmissible to the representative. This is laid down in *Cloberry's case*, 2 Vent., and is agreeable to the civil law.

2dly, The rule of this Court of legacies given out of a real estate is contrary; for there it shall sink for the benefit of the estate. (1)

I am of opinion in this case, that if the infant had survived a year and a half, her representative would have been entitled; for after the year and a half, the 2,000*l.* must be considered as separated from the estate, and considered as making interest for her benefit, and how could this sink into the estate for the benefit of the owner after it is separated from it. Suppose after the money raised, the estate had been sold, and then she had died under eighteen. If this is to be considered as a lapsed legacy who would be entitled to it? Surely not the purchaser out of whose estate it was not raised. Shall then the devisee have it, he has no estate for it to sink into. But I will now consider what is the consequence of *Mary Lewis* dying within the year and a half. By the death of the trustee, (and so far his death is material), there could be no remedy in the ecclesiastical court. Supposing it a legacy out of the personal estate, and as here

(1) See *Prowse v. Abingdon*, ante page 312. and the cases cited in note (2) to that case.

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there are no express words of gift, but the first clause relates to the last, the time is annexed to the substance of the legacy, and therefore even if it were a legacy out of the personal estate only, I think it would not be vested; But here it is charged first upon the real estate, for she directs her house in *Lincoln's Inn Fields* to stand charged with the several gross sums devised as aforesaid before the rest of the premises given to *Godfrey Clarke*, his heirs, executors, and administrators, which comprehends the personal as well as the real estate.

The case of *Whaley* and *Cox* goes further than any case I know.

However this case is plainly distinguishable from it, because here the real estate is first charged. It was intended to be given as a portion, and in such case, this Court has always leaned against giving it to the representative, therefore the bill must be dismissed without costs. (1)

(1) Reg. Lib. B. 1738. fo. 344.

<p>ATTORNEY-GENERAL <i>ex relatione</i>, EDMUND ETHERY, BENJAMIN MOYER, Sir HENRY MAYNARD, MATTHEW WEYMONDSOLD, PETER HARTOP, CHRISTOPHER CURE, on behalf of themselves and the other Inha- bitants of the West Division of the Hun- dred of Becontree</p>	}	Plaintiffs; (1)
and		
<p>SAMUEL HUNTON, Chief Constable of the Division, and THOMAS BRAMSTON, Treasurer of the County</p>	}	Defendants.

July 26th, 1739.

SAMUEL HUNTON, as chief constable of the west division of *Becontree*, having received during a period of nine years and eight months, from the several parishes included in that division, larger sums of money than they ought to have paid; A chief constable of a division having received from the inhabitants of that division more county rates than he ought to have received; upon an information filed against him and the treasurer of the county, by some of the inhabitants, on behalf of themselves and the other inhabitants; the chief constable was decreed to account.

The relators brought this information against the defendant *Hunton*, as chief constable, that he might account for so much as he had received over and above what he ought to have received, and against the defendant *Bramston*, as treasurer of the county, that he might account for what he had received from the defendant *Hunton*, for and in respect of the parishes contained in that division.

Hunton, by his answer, insisted that he ought not to be brought to an account in a court of equity, but that if the relators had any remedy, it was at law.

Mr. Noel and Mr. Serjeant Comyns, for the plaintiffs.

Hunton admits that he has received 254*l.* 7*s.* 10*d.* more than he ought to have received, but insists that he may retain it according to the precedents of his predecessors. There is no ground for his retaining the money. There is no remedy at law but by the particular inhabitants for money

(1) This case is taken from Lord Hardwicke's Note-book.

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had and received to their use. This is like the case of the *Attorney-General* and *Grantham*, coram *Macclesfield*, Chancellor.

Mr. *Browne* and Mr. *Hopkins*, for the defendants. The constant custom for the chief constable to receive something more from the inhabitants than was taxed, in order to satisfy him for his pains. There is no ground for an account in this court. The proper remedy would be an information in the Court of King's Bench. This case differs from the *Attorney-General* and *Grantham*, that was a proper case for an account.

July 26, 1739.

LORD CHANCELLOR decreed that the defendant *Hunton* should account for all the monies received by him as chief constable of the west division of the half hundred of *Becon-tree*, from the inhabitants of the said division, or any of them. But the accounts which have been passed between him and the treasurer of the western division of the county, for monies received by virtue of any rates or assessments were not to be ravelled into; and what should be found due upon his account, was to be paid to the said defendant *Bramston*, to be by him disbursed and paid over to the respective inhabitants of the said division, from whom the same was received, or the representatives of such of them as were dead: and the said defendant *Hunton* was to be indemnified by the relators against any action or suit that might be brought against him by any of the inhabitants, or representatives of such of them as were dead of the said division, for any money that should be paid by him to the said defendant *Bramston*. And it was ordered, that the defendant *Hunton*, pay unto the relators their costs of this suit, to be taxed by the Master. (1)

(1) Reg. Lib. A. 1738. fo. 663.

HARRISON and Others, Representatives of	} Plaintiffs; (1)
THOMAS HAUGHTON	
and	
ROBERT GRAHAM, and ELIZABETH	} Defendants.
NICHOLAS	

July 27th, 1739.

BARBARA GRAHAM, by her will, devised all her estate, after all debts paid to her mother *Barbara Graham*, her sister *Margaret*, her brother *Robert Graham*, and the defendant *Nicholas*, in trust for the uses therein mentioned, during the lives of her mother and sister, and the longest liver of them, and after their decease, she gave to her brother *John Graham*, since deceased, 300*l.* to be paid to him within six months after the decease of the survivor of them, and appointed her said mother and sister, and the defendants, *Robert*, her brother, and *Elizabeth Nicholas*, executors.

Barbara Graham, by her will, gives to her brother *John Graham*, 300*l.* to be paid to him six months after the decease of her mother and sister; *John Graham* by indenture, in consideration of 100*l.* assigns to *Thomas Haughton*, his

legacy of 300*l.*, and the receipt for the 100*l.* is indorsed upon the indenture, and gives a warrant of attorney to confess judgment, which was entered up for 600*l.* to be void on payment of the legacy; upon a bill brought by *Thomas Haughton* against the representatives of *Barbara Graham* for the payment of the legacy; the defendants insisting by their answer, that the consideration of 100*l.* was not paid, and *Thomas Haughton* having proved in the cause the loss of the indenture, a copy of the indenture, and that a receipt for the 100*l.* had been indorsed thereon; the *Master of the Rolls* referred it to the *Master* to inquire into the consideration of the assignment; but the *Lord Chancellor* upon appeal, reversed the decree, and directed the legacy to be paid to the plaintiffs by the defendants, out of the personal estate of *Barbara Graham* the daughter.

The testatrix died possessed of personal property more than sufficient for the payment of her debts and legacies. *Margaret* alone proved the will. *John Graham* having applied to *Thomas Haughton* to purchase his legacy, the same was purchased by *Thomas Haughton*, and by an indenture dated the 1st of October, 1731, *John Graham* in consideration of 100*l.* sold to *Thomas Haughton* the said legacy, and covenanted that the testatrix left sufficient assets for the payment thereof, and appointed *Haughton* his attorney to receive the same. The receipt for the 100*l.* was indorsed upon the indenture.

(1) This case is taken from Lord *Hardwicke's* Note-book.

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GRAHAM.

John Graham, on the 1st of October, 1731, executed a warrant of attorney to confess judgment for 600*l.*, on the back of which was indorsed a defeasance to make void the judgment upon the performance of the covenants.

The judgment was entered up.

Margaret Graham died on the 15th of July, 1735, and *Barbara*, the mother, died in December 1735, whereupon *Thomas Haughton* brought his bill against the defendants, who are the surviving executors of *Barbara*, the daughter, and executors or administrators of the said *Margaret* and *Barbara*, the mother, to pay the said 300*l.* legacy to him.

The defendants insisted by their answer, that the sum of 100*l.* the consideration for the assignment was not paid, and the defendant *Graham*, by his answer, insisted that his brother *John Graham* was indebted to him upon bond dated the 23rd of May, 1730, for 250*l.*, and that as administrator to his brother, he was entitled to retain out of the legacy, being his only assets, the said sum of 250*l.* with interest.

The plaintiff having lost the indenture of assignment of the 21st of October, 1731, proved in the cause the loss, and a copy of the indenture of assignment, and that a receipt for 100*l.* was indorsed thereon; and upon the cause coming on to be heard before the *Master of the Rolls*, his Honor decreed that it should be referred to the Master to inquire into the consideration of the assignment from *John Graham* to the plaintiff; and for the better discovery thereof, the plaintiff was to be examined upon interrogatories. From this decree the plaintiff appealed, and the plaintiff *Haughton* having died, the cause was revived by the plaintiffs, his representatives.

Attorney-General for the plaintiffs.

At the Rolls, the Court only directed an inquiry into the consideration of the assignment of the then plaintiff *Haughton*; but that is not material in respect of the defendants; and besides, it sufficiently appears, the receipt is sufficient evidence of the payment.

As to the defendant *Graham* insisting to be a creditor of *John Graham*, this legacy is not to be considered as any part of his assets at the time of his death.

Mr. Browne and *Mr. Hollings*, for the defendants.

It is proper that there should be an inquiry into the consideration. Defendant *Robert Graham*, is a creditor of *John Graham*, and therefore if the legacy is not well assigned, it will be assets towards satisfaction of his debt, and

which as administrator to his brother, he may retain. If there is no consideration paid, the Court would not support this assignment. HARRISON
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GRAHAM.

LORD CHANCELLOR ordered the said decree to be reversed, and referred it to the Master to take an account of what was due in respect of the said legacy of 300*l.* assigned by the said deed of the 1st of October, 1731, with interest at 4 *per cent.* from the death of the said *Barbara Graham*, the mother, and an account was directed of the personal estate of *Barbara Graham*, the daughter, and what should be found due for principal and interest of the said legacy of 300*l.* be paid to plaintiff out of such personal estate. (1) July 27th 1739.

(1) Reg. Lib. A. 1738. fo. 453.

MILES v. LEIGH. (1)

Appeal.

July 27th, 1739.

HENRY LEIGH being possessed of considerable personal estate, and seised in fee of a tenement called *Hills*, and being tenant in tail male in remainder, expectant upon the death of *Mary Leigh*, of a messuage and tenement called *Bowery Hay*; on the 23rd of March, 1701, made his will in manner following :—

1 Atk. 573.
Where a testator gives an estate to his wife for life, with remainder to his son in fee, and directs that he shall, when he comes

into possession, as well of the estate devised as of another estate of which he was tenant in tail, pay to the testator's daughter a legacy; held, that though the son never comes into possession of the estates, that the legacy is a charge upon the estate devised, into whatever hands the estate comes.

“As to my worldly goods which God of his goodness hath endued me with, I give and dispose thereof in manner and form following :—I give and bequeath unto my dear wife *Joan Leigh*, all that my messuage and tenement, with its rights, members, and appurtenances called *Hill's* tenement, situate in the parish of *Carhampton*, in the county of *Somerset*, during her natural life, and after her decease, unto *Robert Leigh*, my son, and his right heirs for ever : *Item*, I give and bequeath unto *Henry Leigh*, my son, the sum of 150*l.* of lawful *English* money, to be paid in twelve

(1) The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from a manuscript report.

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months time, when *Robert Leigh*, my said son shall come to and enjoy the said tenement called *Hill's* tenement, and also that my message and tenement called *Bowery*, otherwise *Bowery Hay*, situate in the parish of *Carhampton* aforesaid. *Item*, I give and bequeath unto my daughter *Mary Leigh*, the sum of 150*l.* of lawful *English* money, to be paid in twelve months time, at and upon the time that my said son *Robert Leigh*, shall come and enjoy the said premises above-mentioned; and in case that my said son *Robert Leigh* shall happen to die before *Joan*, my said wife, that then my true intent and meaning, and will is, that the said *Henry Leigh*, my son, he coming to the possession of the said premises, and surviving his said mother shall pay to the said *Mary Leigh*, my said daughter, the sum of 200*l.* of lawful money of *England*. *Item*, All the rest and residue of my goods and chattels of what nature or kind soever, I do give, devise, and bequeath, unto my dear and loving wife *Joan Leigh*, whom I do appoint sole executrix of this my will."

Joan proved the will, possessed herself of the testator's personal estate, and entered upon and enjoyed the *Hill's* tenement, till the time of her death, which happened in the year 1729.

Upon her death (*Robert* and *Henry* both dying in the lifetime of *Joan*,) the defendant *Henry Leigh*, as son and heir of *Robert*, who was son and heir of *Henry* the testator, entered upon the premises called *Hill's* tenement; and he likewise became entitled as tenant in tail upon the death of his father, to the premises called *Bowery Hay*.

In Easter Term 1736, the plaintiff brought her bill against the defendant, for the payment of the legacy of 150*l.* and interest, insisting that the said *Hill's* tenement and *Bowery Hay*, were by the will of her father charged with the said legacy.

The cause coming on to be heard before the *Master of the Rolls*, his Honor decreed that it be referred to the Master to see what was due to the plaintiff for her legacy of 150*l.*, and to compute interest at 4 *per cent.* from a year after the death of the said *Joan Leigh*, and that the defendant pay what was found due, or in default thereof, the defendant was to account for the rents and profits of the *Hill's* tenement, and directed the said *Hill's* tenement to be sold to pay the same legacy. And he further decreed, that the plaintiff's bill, so far as it related to the estate called *Bowery Hay*, be dismissed, and the consideration of costs was reserved.

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LEIGH.

On the 27th of July, 1739, this cause came on before his Lordship upon an appeal on the part of the defendant, from the decree of the *Master of the Rolls*.

The *Attorney-General* for the plaintiff insisted, that the words of the will giving the legacy at the time the estate comes to *Robert Leigh*, shewed that it was intended that it should be paid out of that estate.

Mr. *Pauncefort*, Mr. *Chute*, Mr. *Browne*, and Mr. *Jodrel* for the defendant.

This never could be intended as a charge upon this estate, it must be paid out of the personal estate. There are no express words or necessary implication in the will of the testator to charge this estate. There is no direction that this legacy should be paid out of the land, it only points out the time when it shall be paid, it is directed to be paid when *Robert* comes to the estate, and when *Henry* comes into possession, it is directed that he shall pay it, but it is no where said, that it shall be paid when it comes to their heirs. The testator has no where disposed of the estate called *Bowery Hay*, and he might intend that the legacy should be paid at the death of the mother out of the personal estate when she no longer would want it. But even if this were a charge upon the real estate, it was a charge contingent upon *Robert's* coming into possession of the estate, and the contingency never happened, both sons dying in the lifetime of their mother.

LORD CHANCELLOR:—This will is very obscurely penned, July 27th 1739. and I think the construction of it must arise upon taking the whole will together, and I think the decree at the rolls was right.

The will must be considered as if the legacy followed the devise of the land, and I think it is to be considered as a condition annexed to *Robert's* estate, and the same as if the testator had said, *he paying*.

And there are many cases where *adverbs* of time have been considered as creating conditions, and the clause of payment by *Henry Leigh* must be taken into consideration which is not a distinct legacy, but an increase of the same, when he came to the estate. As to *Hill's* tenement being but of small value, it is plain, the testator intended this payment should come out of both estates, though he had no power over the other. For it is not a rule in wills that a man would distribute what he has to give equally, but he

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regards rather equality of provision that is at all events to come amongst his family.

It is not said, he shall pay these legacies within a year after the mother's death, but when he comes to possession of both estates, which might be long after; for *Bowery Hay* was then enjoyed by a tenant for life, who might survive *Joan*, and therefore if *these were legacies*, payable out of the personal estate, no reason can be assigned why he should fix that particular time to them: but the time respecting the possession of the estates only, gives on the other side a strong ground for the implication of their being a charge on them. As to the contingency, it is said it depends on *Robert's* enjoyment, but I think the proper construction is, when the devise to *Robert* takes effect only, and if it is considered as a condition annexed to *Robert's* estate, it will then bind his heirs as well as him. *Marks v. Marks* is a strong authority to that purpose. As to the argument drawn from the word residue, he begins his will with disposing of all *his* worldly goods, which include both his real and personal estate, and then after giving the estate, what the wife takes is properly a residue, but that is too slight to ground the construction upon. I think on the whole will, it was clearly the intent of the testator, to charge the lands into whosoever hands they came, with this sum of money, and if *Henry* came into possession then to increase it.

Appeal dismissed, no costs on either side. (1)

(1) Reg. Lib. B. 1738. fol. 351.

PIERSON *v.* SHORE.

CHARLES PIERSON and MARY his Wife Plaintiffs; (1)

and

ELIZABETH SHORE Widow, JAMES
PYM, WILLIAM HAYE, and WIL- } Defendants.
LIAM DOBLE. }

November 13th, 1738. July 28th 1739.

DOCTOR EADES being entitled to a lease for three lives 1 Atk. 480.
under the Dean and Chapter of *Chichester* settled it upon *Mary Briggs*
various uses with an ultimate remainder to the right heirs to a lease to
of his son *Henry*. her and her heirs for three
lives devises

the same to her daughter and directs that the trustees shall manage her estate for the bene-
fit of her daughter either by placing her monies out at interest or by making purchases;
The trustees upon the decease of one of the lives in the lease agree with the dean and chapter
of *C.* the lessors, that the existing lease should be avoided by forfeiture for non-payment of
rent, and that a new lease should be granted for the benefit of the daughter; the old lease
having been avoided by forfeiture, a new lease is granted to the trustees in trust for the
daughter and her heirs, which new lease is afterwards surrendered in consideration of a
similar lease; the daughter dies an infant, the lease shall go to the heirs of the infant *ex*
parte paternâ.

Doctor *Eades* and his son *Henry* being dead, *Mary*
Briggs became entitled to the lease as heir at law to the
latter, and having duly surrendered it, a new lease was on
the 2nd of May 1726 granted to her and her heirs for three
lives in which there was a proviso for re-entry in case of
non-payment of rent for 21 days.

Mary Briggs by her will dated the 14th of March 1725
devised this lease to her only daughter, and appointed the
defendant *James Pym* and others guardians and trustees
of her daughter, and directed them to order and manage her
estates both real and personal for the payment of her debts,
and to and for the use and benefit of her daughter to grant,

(1) The statement of this case and judgment from his Lordship's Note-
the arguments of counsel are taken from book, a manuscript report, and Mr.
Lord Hardwicke's Note-book; and the *Atkyns's* report.

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and make leases to undertenants of the best improved rents, and in such manner as they in their discretion should think fit and most for the benefit of her said daughter, and to receive the rents and profits of her said estate both real and personal, and to make the best improvement of her estate they could, by placing monies out at interest, or making purchases for her as they should think fit to and for the use and benefit of her said daughter.

Mary Briggs being dead, and one of the lives upon which the lease was held having dropped, the trustees under the will, agreed with the Dean and Chapter that the lease should be avoided by forfeiture for non-payment of rent, and that the Dean and Chapter should grant a new lease for three lives for the benefit of the infant daughter of *Mary Briggs*.

The old lease having been accordingly avoided by forfeiture, the Dean and Chapter of *Chichester* granted a new lease dated 24th of October 1727 for three lives to the trustees and their heirs under the will in trust for the use and benefit of the said *Mary Briggs*, the daughter, her heirs, and assigns.

This new lease was afterwards surrendered, and a similar lease dated the 18th of May 1731 was granted to the defendants *Pym*, *Haye*, and *Doble* for three other lives.

One of the lives upon which the lease of 1726 was granted was still in being.

The daughter of *Mary Briggs* died an infant at the age of twelve years, leaving the plaintiff *Mary Pierson* her heir, *ex parte maternâ*, and the defendant *Elizabeth Shore*, her heir *ex parte paternâ*.

The bill prayed an assignment of the lease, and an account of rents and profits from the death of the infant.

The cause first came on to be heard on the 13th 14th and 16th of November 1738, when it was contended on behalf of the plaintiff.

1st, That the old lease being inheritable by heirs, *ex parte maternâ*, the new lease was subject to the same uses, and therefore descended to those heirs.

2dly, That the old lease was not well avoided by the forfeiture, and was therefore still a subsisting and valid lease.

The defendant *Elizabeth Shore* contended that the old lease was effectually avoided, and claimed the new lease as heir *ex parte paternâ*.

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v.
SHORE.

Upon this hearing, the *Lord Chancellor* directed a trial at law in an ejectment, in order to try whether the lease of 1726 was avoided in point of law by a sufficient demand and re-entry.

Upon that trial it was found that the lease of 1726 was well avoided.

The cause came on again on the 28th of July, 1739, when the only question was, whether the new lease descended to the heirs of the infant, *ex parte maternâ*, or to those *ex parte paternâ*.

Mr. Browne, Mr. Noel, Mr. Fazakerley, and Mr. Talbot for the plaintiff.

The descendible quality of these freehold leases is governed by the same rules as estates of inheritance at common law, Vaugh. 201. *Finch v. Tucker*, 2 Vern. 184. *Wastney's v. Chappell*, 1 Bro. P. C. 457. *Baxter v. Dowdeswell*, 2 Lev. 138., in which it was held a lease for three lives of Borough English lands descended to the youngest son of the lessee.

It is established by the verdict that there has been a forfeiture of the old lease, but equity will look to the intention of the whole transaction. The forfeiture was incurred by agreement for the purpose of having a new lease granted. The forfeiture must therefore be considered as a surrender, and the lease granted upon that forfeiture as a renewed lease. But the right of renewal is an inheritable right, and a renewed lease is considered as an engraftment upon the original right, as a continuance of it, and as subject to the same uses.

If an original lease is subject to trusts, a renewed lease will be subject to the same.

A lease renewed by an executor or administrator is considered as assets. If an original lease is entailed, a renewed lease is subject to the same limitations. *Palmer v. Young*, 1 Vern. 276.

If a real forfeiture had been incurred, and the infant had died before the renewal, relief against the forfeiture would have been granted to the heir, *ex parte maternâ*. The heir, *ex parte paternâ*, shall enter for a condition broken; but if the lands descended from the side of the mother, the heir, *ex parte maternâ*, shall enter upon him. Co. Litt. 12, 13.

At law, the admission of an heir to a copyhold estate is a new grant; but if the estate come *ex parte maternâ*, it will descend in the same way.

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If an infant is entitled to the equity of redemption upon a mortgage in fee, and the trustees buy in the mortgage, or redeem and take a conveyance to themselves in trust for the infant and his heirs, the heir of the infant, *ex parte maternd*, will inherit the estate, if the equity of redemption came from that side.

If an estate descended *ex parte maternd*, be settled to various uses with an ultimate remainder to the right heirs of the settlor, the heir, *ex parte maternd*, is entitled. *Abbot v. Burton*, 2 Salk. 590.

This Court will not suffer trustees for infants to change the nature of the property from real to personal, or from personal to real, or from one kind of real property to another. If that were permitted, trustees would, in effect, have the power of making wills for the infants.

In *Witter v. Witter*, Hil. 4 Geo. 2. *coram King*, C. it was decreed that a freehold lease which had been granted to executors in trust upon a surrender by them of a chattel lease, to which an infant was entitled, should, upon the infants death be distributed as personal property.

In *Mason v. Goodrick*, the Court directed that the money produced by timber, which had been cut down by the guardian of an infant should be re-invested in land; and in *Drake v. Drake*, the late Lord Chancellor, in directing the profits of an infant's estate to be applied in the discharge of incumbrances, provided that they should be assigned as securities that the infant might have the power of disposing of the money during his infancy.

If the heir *ex parte maternd* is not entitled to the whole of the new lease, he is at least entitled so long as any of the lives in the old lease shall continue, or to have the new lease upon paying the expenses of the renewal.

The case of the Earl of *Winchelsea v. Norcliffe*, 1 Vern. 435, was decided upon the same principle.

Mr. Attorney-General, for the defendant.

The heir does not succeed to these freehold leases as heir but as special occupant and every special occupant is a purchaser and takes as an assignee at law, *Vaugh.* 204, 205.

If this lease had been surrendered by a person of full age, it is clear that a renewed lease granted upon such surrender would have been a new estate, and that the descent would have been broken. If a man make a feoffment in fee, and take back an estate to him and his heirs, it is a new estate

Co. Litt. 12 b., but it is said that the trustees had no right so to deal with the estate as to create any alteration in it.

We insist that the trustees were justified in what they did by the will of *Mary Briggs*. She directed her trustees to make purchases from time to time for the benefit of her daughter.

In the execution of that trust they acquired this new lease for the infant by which her estate has been greatly benefitted.

In *Mason v. Goodrick* and the other cases cited, the trustees had no power to do the acts by which the nature of the property was changed, in this case they had.

In *Mason v. Day*, Prec. in Ch. 319., and Gilb. Eq. Rep. 77. this very question was decided.

LORD CHANCELLOR. The lease is a descendible freehold ; July 28th 1739. and if no alteration had been made it would have gone to the heir *ex parte maternâ*, but the new lease is to be considered as a new purchase, and vested in the infant as a purchaser ; and the question is how this new lease will go, considered as a new purchase.

If the infant had lived till full age, and had then surrendered the old lease and taken a new one, it certainly would have gone to the heirs *ex parte paternâ*. So if all the lives had died and the lease had been renewed it would likewise have gone to the heirs on the part of the father.

The true reason why the guardians of an infant cannot convert his personal estate into real, is because the infant would thereby be deprived of the power of disposing of it so soon, and not out of any regard to the real or personal representative.

The reason why an infants' personal estate cannot be converted into real, is because the infant would

be thereby deprived of the power of disposing of it so soon, and not out of any regard to the real or personal representative. (1)

In the case of a lease in trust, or entailed, a renewed lease would indeed be subject to the old uses ; (2) but in those cases the *cestui que trust* and remainder man had an actual interest in the original lease which the claimants in this case had not.

(1) *Witter v. Witter*, 3 P. Wms. 100. note (D). *Rook v. Warth*, 1 Ves. 461.

(2) So *Holt v. Holt*, 1 Ch. Cases, 190. *Edwards v. Lewis*, 3 Atk. 538. *Pickering v. Fowles*, 1 Bro. Ch. Ca. 197. *Rawe v. Chichester*, Amb. 715. 1 Bro. Ch. Ca. 198. S. C. note.

Owen v. Williams, Amb. 734. 1 Bro. C. C. 199. S. C. in note. *Taster v. Marriott*, Amb. 668. *James v. Dean*, 11 Ves. 383. and 15 Ves. 236. *Featherstonhaugh v. Fenwick*, 17 Ves. 299. *Randall v. Russell*, 3 Mer. Rep. 190. *Ilardman v. Johnson*, ib. 347.

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The renewal was a reasonable and proper act for the trustees to do. The interest of the infant required that it should be done; and how could the trustees have done it, so as to secure the inheritance of the property to the heirs, *ex parte maternâ*, only by giving an estate for life to the infant, with a remainder to those heirs, as purchasers; but that would have diminished the infant's estate, which the trustees would not have been justified in doing.

If indeed the lease had been wantonly renewed, without any sufficient reason or real benefit to the infant, there might have been ground for coming into this court for relief; but in the present case, there was sufficient reason for what was done; it was necessary to preserve the infant's interest entire.

Besides, in the present case, the executors of the mother were by her will directed to manage the infant's estate and to make purchases as they should think fit; now this was as proper a purchase as could have been made and must be considered as having been done in pursuance of that power.

This circumstance makes the present case plainer, but it should have been of the same opinion, if it had not existed.

The case of *Mason v. Day*, is precisely in point with the present.

It has been argued that the plaintiff is at least entitled to the new lease, upon paying the charges of the renewal; but to whom is that money to be paid? not to the personal representatives, for there is no debt; and not to the heirs *ex parte paternâ*, because the money was not raised out of the estate; but it would be taking from them an estate to which they are entitled.

The following note is taken from the *Lord Chancellor's* Note-book:—

"Bill dismissed without costs, on the reasons and authority of the case of *Mason and Day*." (3)

His Lordship declared, that the defendant, *Elizabeth Shore*, as heir at law to the said *Mary Briggs*, the infant, on the part of the father, is entitled to the trust and benefit of the leasehold estate in the pleadings mentioned. (4)

INDEX

TO THE

PRINCIPAL MATTERS.

A.

ACCOUNT.

1. Mr. HALL being entitled to considerable property under his uncle's will, five weeks after he comes of age settles an account with, and executes a release to, the executor of his uncle; under the circumstances of the release being prepared and engrossed by the executor before the accounts had been submitted to Mr. Hall,—of Mr. Hall's not having examined the accounts,—of the account itself not giving sufficient information without inspecting the books, which were not delivered to him,—of there being likewise an error in the account by a sum of 570*l.* being charged twice; of a gift likewise of 3,000*l.* East India Stock from Mr. Hall to the executor, at the time of the settlement of the will,—of the executor having, since the death of Mr. Hall, broken open a box containing

- papers, some of which related to the accounts, and taken away some papers, and having made entries in the books subsequent to Mr. Hall's death: It was held, that the stated account should be opened, though many small accounts had been afterwards settled, and though there had been an acquiescence by Mr. Hall until the time of his death. *Page* 148
2. Where the defendant sets up a stated account to a bill brought for a general one, the plaintiff must amend. 11
 3. Where a defendant sets forth a stated account, it is a bar to a general one, till particular errors are assigned. 171
 4. A chief constable of a division having received from the inhabitants of that division more county rates than he ought to have received; upon an information filed against him and the treasurer of the county, by some of the inhabitants, on behalf of themselves and the other inhabitants; the chief constable was decreed to account. 703

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ADMINISTRATOR.

See EXECUTOR.

ADVANCEMENT.

1. Where the father made an appointment of certain premises, for raising 8,000*l.* for the marriage portion of one of his daughters, and as to the residue amongst his other younger children, and afterwards gives that daughter a marriage portion of 20,000*l.* It was held, that the other younger children were not entitled to the 8,000*l.*, but that the father became a purchaser of, and was entitled to the 8,000*l.* and interest, from the time of the marriage of his daughter.

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2. A father purchases a copyhold estate in the name of his son, then of the age of eighteen, and the father continues in possession till his death. Upon evidence that the father had declared that he had made the purchase for his son's benefit, this shall be considered as an advancement of the son, and not a trust for the father, though the son had given two receipts for rent for the use of his father.

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ALIEN.

1. A bill brought for an account against the representatives of an *East India* Governor, who pleaded that the plaintiff was an alien born, and an alien infidel, and could have no suit here. The plea over-ruled; for being a mere personal demand, the plaintiff being an alien infidel, may bring a bill in this Court.
2. The persons of foreigners, subject to the authority of this Court, only, while in *England*; but though their persons are out of the reach of this Court, yet the property they have here in the funds, is under the control of it.

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AMENDMENT.

See PUBLICATION, 2.

ARBITRATOR.

See AWARD.

ARREST.

Though a man is arrested by due process, yet if a wrong use is made of it against him by obliging him to execute a conveyance while under arrest, this Court will relieve.

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ASSETS.

Lands devised to an executor to sell, are legal assets.

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But see the note subjoined to this case. See LIMITATIONS, Stat. of, 3

AWARD.

1. Award set aside on account of marriage articles being concealed from one of the arbitrators.
2. *A.* by articles previous to his marriage agrees to vest 1,000*l.* in trustees, the interest thereof to be received by *A.* and his wife, during their lives, and afterwards to be divided between their issue, and gives the trustees a warrant of attorney to confess judgment for that sum, which was entered up accordingly; *A.* enters into partnership with *B.* afterwards, and being indebted to the partnership estate in more than his interest in that estate, they submit the difference between them to arbitration, and part of the stock in trade is awarded to be deposited in the hands of a third person; any part to be delivered to either of the parties on making it appear any bond or other debt due from the partnership had been paid by either, the quantity to be delivered in proportion to the money paid; the trustees in the marriage articles having taken a moiety of the stock in trade as the property of *A.* in execution upon the judgment; upon a bill brought by the partnership cre-

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ditors to set aside the execution, and to have the stock appropriated for the payment of their debts; Held that the plaintiffs being neither parties to the submission or privy to the transaction, were not entitled to the benefit of the award. Page 304

BANKRUPT.

1. Joint commission against two partners does not abate by the death of one; but if one be dead at the time of taking out the commission, it is void. 21
2. Plea of bankruptcy allowed though it did not aver that the commission was in force. If a commission abates by the death of the King, or is superseded by the consent of the creditors, the property remains in the assignees until a re-assignment; but if it is superseded for irregularity it is void, *ab initio*, and the assignment made is void. 129
But see the note subjoined.

3. Pawnbrokers within the statutes of bankrupts, and seem particularly included in the general word brokers, in the 39th section of the 5th of Geo. 2. Though a man be a public officer, as an exciseman, yet if he will trade, he makes himself subject to the statutes of bankrupts. 191
4. If an assignee under a commission of bankrupt, employ the clerk of the commission, a person of very little credit, to pay dividends, who misapplies and embezzles the money, the assignee will be liable to make it good to the creditors, unless he consults the body of the creditors in his appointment of the agent. 201
5. A commission of bankrupt is an action and execution in the first instance. Separate creditors may come under a joint commission, and prove their debts. 297
6. *C.* in 1720, gave 300*l.* for an annuity of 30*l.* *per ann.* for her life, payable out of a persons estate, who becomes a bankrupt in 1738. Commissioners directed to settle the value of her life, and *C.* to be admitted a creditor for such valuation, and the arrears of her annuity, and not for the whole 300*l.* 469

7. An assignee upon refunding what he had received under two dividends, allowed to make his election to proceed at law against the bankrupt. Page 633

But see the note subjoined.

8. A landlord may distrain for his rent even after assignment or sale by the assignees if the goods are not removed. 634

But see note subjoined.

9. *Martin Unwin* makes an assignment of debts due to himself, in order to secure the sum of 500*l.* due to the plaintiffs, and for their security against a recognizance entered into by them on his behalf, and a month afterwards becomes bankrupt; Held, that the assignment is good and not fraudulent against the other creditors of the bankrupt. 647

BARON AND FEME.

1. Sir *Richard Francis Moore*, in consideration of marriage and a portion, conveys land to trustees for ninety-nine years, if he should so long live, upon trust to pay 100*l.* *per annum* for the separate use of his wife. The wife, in 1728, many years after the marriage, upon disputes with her husband relative to her pin-money, and the legacy given to her by her mother, eloped from her husband and went to live in *France*. In 1734, the annuity being considerably in arrear, the trustees bring an ejectment to recover the term. At a subsequent period in the same year, the husband brings a suit in the Ecclesiastical Court for restitution of conjugal rights, in which a sentence of excommunication is passed against the wife for not appearing. Upon a bill brought by the husband for an injunction to restrain the proceedings in ejectment: held, under the circumstances of the suit in the Ecclesiastical Court being not instituted until eight years after the elopement, and subsequent to the ejectment brought by the trustees, of the husband having never made any offer to

the will that she should retain, and of her having paid the money to his wife some time after the separation, that the Court would not interfere to prevent the payment of the annuity, notwithstanding the husband by his bill offered to receive his wife again, and in that case to pay her the annuity. Page 35

2. *A.* survives her first husband, who left her a legacy: she dies, the legacy being unremoved by the second husband during her life, but after her death he administers, and dies before the legacy came to his hands: his administrator gets it in, and the administrator *de bonis* non of the wife brings this bill for the legacy: equity considers the administrator *de bonis* non as a trustee for the administrator of the husband, who having an absolute right by surviving his wife, his administrator ought to have the benefit of it. 66

During the coverture, husband and wife are but one person; but when she dies he has a right to administer exclusive of all other persons. 66

3. *A.* had 300*l.* per annum pin-money, the husband for several years before his death paid her 200*l.* only, but promised her she should have the whole at last: held, that she was entitled to the arrears of her pin-money out of the estate upon which it was charged; But if the wife accepts less, or lets her husband receive what she has a right to receive to her separate use, it implies a consent in her to such a method, where the husband and wife have cohabited together for any time after. 302

4. In marriage contracts, when the fortune of the wife is paid to the father, or to clear incumbrances, or to the son; and the father and the son, who are parties to the marriage contract, covenant jointly that the wife's jointure shall be of a certain value, in case of a deficiency the wife has a lien both upon the estate of the father and son. 638

See EXECUTOR, 5. MORTGAGE, 4. PARTIES, 2.

BASTARD.

Though bastards strictly are not sons, yet, if they have acquired that name by reputation, in common parlance they are; though a person's name be mistaken in a devise, yet if made out by averment to be the person meant, the devise to him is good. Page 183

BILL OF EXCHANGE.

1. Every indorser is a new drawer. 7
2. If a person on whom a bill of exchange is drawn, says in a letter to the drawer, it shall be duly honoured and placed to your debit, this is an acceptance, and will make him liable, for a parcel acceptance has been held to be good, and so determined in a case made for the opinion of the Court of King's Bench in the time of Lord Hardwicke, Chief Justice. 70

BONDS FOR MARRIAGE BRO-CAGE.

See MARRIAGE, 1.

C.

CANCELLING.

See MORTGAGE, 5.

CHARITY, CHARITABLE USES.

1. *J. B.* by his will gave a freehold house to the Charity School at *Romford* so long as it should continue to be endowed with charity, and in case a debt of 1,000*l.* owing to him should be paid to the *Cooper's Company*, then he gave the said house to the *Company*, the rents and profits thereof to be distributed amongst the alms-people belonging to the almshouses at *Ratcliffe*, and he directed that the interest and profits of the said 1,000*l.* which he gave to the said *Company* should be applied for

the building four alms-houses near *Romford*; the debt of 1,000*l.* devised by the will turned out to be only 365*l.*; Held, that the 1,000*l.* not being received by the *Cooper's Company*, the devise to the Charity School at *Romford* was absolute, and that the sum of 365*l.* was not a lapsed legacy, but that the same should be placed out, and the interest should not be applied to the building the alms-houses at *Romford*, but amongst the alms-people belonging to the alms-houses at *Ratcliffe*.

Page 587

2. Where a commission of charitable uses was directed to commissioners to enquire by twelve lawful men of the borough of *Ilchester*, in the county of *Somerset*, concerning any appointments to or abuses of any charities within the said borough: held, that the commission was well awarded, for the statute did not oblige the Chancellor to issue such commission for entire counties alone; that the direction to the jury of the county instead of being to the jury of the body of the county, was good; and that they might inquire respecting lands lying out of the town, in the county at large. 184

3. The Court will give a proper direction as to a charity, without regard to an impropriety in the prayer of an information. 208

4. Where a testator left his personal estate to certain charities, but directed that the charities should be performed at the discretion of the executors, the qualifications and characters of the objects of the charities to be well considered by his executors: held, that the executors could not divide the objects of the charities into three parts, each nominating a third; and that a list or nomination made by one of the executors, who was since dead, of some of the objects of the charity, was invalid. 491

5. By the 10th and 11th of Wm. 3. c. 8. certain tolls were imposed upon vessels navigating the river *Tone*, the surplus of which, after purchasing the interest in the navigation, and in

making and keeping the river navigable, was to be applied by the conservators for the benefit of the children of certain parishes in the act mentioned; and the account of the receipts and disbursements of the conservators were every year to be brought before the bishop of *Bath and Wells*, and the justices for the county of *Somerset*, or any five or more of them who were to examine and allow the accounts, at the next general Quarter Sessions to be held after the 24th day of June; The justices having examined and allowed the accounts, the bishop not having been proved to be present, and the commissioners of charitable uses having taken upon themselves to examine the accounts; it was held that the commissioners of charitable uses had no authority to examine the same, but that the bishop and the justices had a summary jurisdiction to examine and pass the accounts.

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See INFORMATION.

CHARGE.

1. *Thomas Harborne*, by his will directs that his debts should be paid by his executrix, and after charging his real estate with 4*l.* per annum, for providing coats for poor persons, he gives, in case his daughter shall have no issue, 2,000*l.* to trustees, for charitable purposes, and all the residue of his estate, real and personal, he gives to his daughter, and appoints her sole executrix; his daughter having died without having had issue, it was held, that the 2,000*l.* was not, but that the debts were, a charge upon the real estate. 102
2. Where a testator by his will gives certain estates to trustees upon trust to pay the rents and profits towards the payment of his debts and legacies, until the same shall come to his son *Thomas*, and then gives the said estates to his son *Thomas* when he attains twenty-six; but in case his son *Thomas* should die before twenty

ty-six, then he gives the plaintiff 1,000*l.*, and gives all the estates given to *Thomas* to his son *Edward*; *Thomas* having died before twenty-six, it was held, that in case the personal estate was deficient, the rents and profits of the estates devised in trust for *Thomas*, should be applied in payment of the 1,000*l.* and interest, until *Thomas* would have attained the age of twenty-six.

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3. *E. W.* devises to his second son, *Thomas Wigge*, and his heirs, certain lands, upon condition to pay to his grandchildren (the children of the said *Thomas*) 90*l.* to be equally divided amongst them, and on default of payment, then that they might enter, hold, and enjoy the premises; *Thomas* died in the testator's lifetime; the son of the eldest son of the testator entered on the lands as heir at law, and sold them; the legacy to the children of *Thomas*, the testator's second son, is a continuing charge on the lands in the hands of the purchaser, and they are entitled to be satisfied for the same with interest.

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4. Where a testator gives an estate to his wife for life, with remainder to his son in fee, and directs that he shall, when he comes into possession, as well of the estate devised as of another estate of which he was tenant in tail, pay to the testator's daughter a legacy; held, that though the son never comes into possession of the estates, that the legacy is a charge upon the estate devised, into whatever hands the estate comes.

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See DEBT, REAL ESTATE.

CONSIDERATION.

A widow who had two children by a former husband, and these two children, each of them a child, and being entitled after the death of her mother, to certain freehold, copyhold, and leasehold estates, by articles before her second marriage, to which her

husband was a party, and with his consent, covenanted that trustees should stand seized of the freehold, copyhold, and leasehold estates, if no issue of the marriage, in moieties; one to the plaintiff, her grandson, his heirs and assigns, the other to her grand-daughter in fee; provided, if there should be any child or children of the marriage, such child or children, to have an equal share of the said estates with the grandson and grand-daughter; the husband and wife afterwards mortgage the estates to persons who had notice of the articles; declared that the articles are no voluntary agreement, but a binding one, and that it was not fraudulent and void against subsequent purchasers or creditors.

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CONSTRUCTION.

1. A testator after disposing of his real estate, and giving a general legacy of 100*l.*, gives all his moneys not otherwise by his will disposed of to his younger children, and the residue of his personal estate to his wife. Under the word "moneys," East India stock passes to the children. 172
2. *R. L.* devises to *R. M.* eldest son of his nephew *R. M.* and the first heirs male of his body, and the heirs male of his body, and in default of such issue, to the second son of the said *R. M.*, and the heirs male of his body, and their issues, remainder over, &c. These words, "the second son of the said *R. M.*" do not mean the second son of the devisee, but *John*, the second son of the testator's nephew *R. M.* 250
3. Sir *Edward Nichols* being entitled to the advowson of *Hardwicke*, by his will devises to his trustees and their heirs all and singular his messuages, cottages, closes, farms, woods, lands, tenements, and hereditaments, lying in *Hardwicke*, &c. and all other his lands and tenements whatsoever not before devised, with their appurtenances, upon trust to pay 30*l.* per

annum, to each of the vicars of eight vicarages, one of which was the vicarage of *Hardwicke*, and directs the surplus of the rents to be disposed of to such charitable uses as his trustees should think fit; the church of *Hardwicke* having become vacant after the death of the testator, upon a bill filed against the trustees by the heir at law of the testator alleging that the advowson passed to them under the will, and against the bishop to compel him to grant institution to the plaintiff's clerk; it was held upon the certificate of the judges, that the advowson did not pass by the will to the trustees; and a lapse having been incurred the bishop was decreed to admit the plaintiff's clerk. *Page 510*
See RENTS AND PROFITS.

CONTINGENT REMAINDERS.

See TRUSTEES TO PRESERVE, &c.

COPYHOLD.

1. Where a person having purchased a copyhold in his own name and in the names of two other persons, devises it to his wife without having made a surrender, the Court will supply a surrender in favour of the wife, though she is not unprovided for, as against a person who stands in the situation of a *hæres factus*; and though by the custom of the manor unless a disposition is made of the copyhold in pursuance of a surrender, the beneficial interest therein goes to the next in remainder named in the grant. 98
2. In order to establish a right in a tenant of a copyhold estate for lives to a renewal, he must shew in certain upon payment of what fine he has a right to renew. 649

COSTS.

1. Issues directed by this Court, to try a *modus*, though established in favour of the plaintiff by two verdicts, the plaintiff entitled to his costs at law only, and not in equity. 234

2. Upon payment of 20*s.* costs, bills may be amended after answer put in, but the *Lord Chancellor* said he would consider how to make a more adequate compensation to a defendant for the future, after a long answer, and other necessary proceedings on the part of the defendant. *Page 581*
See EXECUTOR, 1, 4. And RENT, 1.

CROSS REMAINDERS.

- A. devises lands to his wife for life, and after her decease to his son and daughter, *John and Margaret*, to be equally divided between them, and the *several and respective* issues of their bodies, and for want of such issue, to his wife in fee; this will not create a cross-remainder, which can only be raised by an implication absolutely necessary, which is not the case here, for the words *several and respective*, effectually disjoin the title. 460
But see the note subjoined to this case.

CROWN.

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CUSTOM OF LONDON.

See PARENT AND CHILD.

CUSTOM.

See PARTIES, 2.

CURTESY, TENANT BY.

See MORTGAGE, 3.

D.

DEBT.

- A testator devises his estate to his wife for life, subject to a term of 2,000 years, which he gives to his trustees, from the day of his death, upon trust, with the consent and direction of his

the wife that she should return, and of his having paid the money to his wife some time after the separation, that the Court would not interfere to prevent the payment of the annuity, notwithstanding the husband by his bill offered to receive his wife again, and in that case to pay her the annuity. *Page 35*

2. *A.* survives her first husband, who left her a legacy; she dies, the legacy being unreceived by the second husband during her life, but after her death he administers, and dies before the legacy came to his hands; his administrator gets it in, and the administrator *de bonis non* of the wife brings this bill for the legacy; equity considers the administrator *de bonis non* as a trustee for the administrator of the husband, who having an absolute right by surviving his wife, his administrator ought to have the benefit of it. *66*

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4. In marriage contracts, when the fortune of the wife is paid to the father, or to clear incumbrances, or to the son; and the father and the son, who are parties to the marriage contract, covenant jointly that the wife's jointure shall be of a certain value, in case of a deficiency the wife has a lien both upon the estate of the father and son. *638*

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BILL OF EXCHANGE.

1. Every indorser is a new drawer. *7*
2. If a person on whom a bill of exchange is drawn, says in a letter to the drawer, it shall be duly honoured and placed to your debit, this is an acceptance, and will make him liable, for a parol acceptance has been held to be good, and so determined in a case made for the opinion of the Court of King's Bench in the time of Lord *Hardwicke*, Chief Justice. *70*

BONDS FOR MARRIAGE BRO-CAGE.

See MARRIAGE, 1.

C.

CANCELLING.

See MORTGAGE, 5.

CHARITY, CHARITABLE USES.

1. *J. B.* by his will gave a freehold house to the Charity School at *Romford* so long as it should continue to be endowed with charity, and in case a debt of 1,000*l.* owing to him should be paid to the *Cooper's Company*, then he gave the said house to the *Company*, the rents and profits thereof to be distributed amongst the alms-people belonging to the alms-houses at *Ratcliffe*, and he directed that the interest and profits of the said 1,000*l.* which he gave to the said *Company* should be applied for

and profits to pay off the mortgage and the portion; but died insolvent without having satisfied the portion; held that the estate was not discharged from the portion by the receipt of the executor, but that the portion with interest was to be raised by sale or mortgage of the estate.

Page 577

DISABILITIES.

By marriage articles made on the marriage of *Roger Hill* with *Martha Hill*, certain sums of money are agreed to be laid out in lands, to be settled upon *Roger Hill* for life, remainder to *Martha Hill* for life, remainder to the issue of the marriage, remainder to Sir *Roger Hill's* right heirs; and another sum is agreed to be settled to the same uses, except that *Martha Hill* was to have no life estate therein. The husband being dead, and there being no issue of the marriage, in 1729 *Elizabeth Maria Hill*, as the co-heir with her sister, becoming absolutely entitled to part of the sums, and entitled to another part, subject to the life estate of *Martha Hill*, in 1732, sells her interest therein to the plaintiff, who was a protestant; upon a bill brought by the plaintiff to have that part of the sums to which *Elizabeth Maria Hill* was absolutely entitled paid to him, and to have that part to which she was entitled, subject to the life estate of *Martha Hill*, laid out in the purchase of lands, to be settled pursuant to the articles; it was decreed accordingly, there being no evidence that *Elizabeth Maria Hill* was a papist at the time of the descent cast, though it was proved that in 1735, *Elizabeth Maria Hill* was a nun in a convent at *Lisbon*, professing the Roman Catholic religion. 337

See DISCOVERY.

DISCOVERY.

1. A bill brought to discover whether

Ann Payne, under whose will the defendant claims, was a papist at the time of a purchase made by her of the estate from the plaintiff's ancestor. Defendant pleads as to the discovery the stat of the 11th and 12th Wil. 3., by which, if *Ann Payne* was a Papist, she was disabled to take; under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself; and as *Ann Payne* would not have been obliged to discover, the defendant who claims under the same title, is entitled to the same privileges, and takes the estate under the same circumstances. The plea allowed.

Page 16

2. Where a bill is for a discovery merely, you cannot move to dismiss it for want of prosecution, but pray an order only on the plaintiff to pay defendant the costs of the suit to be taxed. 568

See PLEA, 2.

DISTRIBUTION, (STATUTE OF.)

1. Aunts and nephews in equal degrees of kindred and equally entitled under the statute of Distribution. 448
2. *William Stanley*, and *Anne* his wife, had two sons, *George* and *Hoby*, who severally married in their father's lifetime; *William* the father dies, *Anne* his wife survives him; *George* afterwards dies, and leaves several children, who are still living, then *Hoby* dies intestate, leaving *Philippa* his wife possessed of a very large personal estate; the children of *George* bring a bill against *Philippa*, who has administered to her husband, and also against *Anne* their grandmother, insisting, that, as the representatives of their father, they were entitled with their grandmother to one half of the moiety of the intestate's estate, the wife being entitled to the other moiety, by the 22 and 23 Car. 2. c. 10.; the residue of the intestate's estate, after satisfaction of debts, directed to be divided into four equal parts, two fourth parts thereof to be retained by *Philippa* the intestate's widow, one fourth part to be paid to

ty-six, then he gives the plaintiff 1,000*l.*, and gives all the estates given to *Thomas* to his son *Edward*; *Thomas* having died before twenty-six, it was held, that in case the personal estate was deficient, the rents and profits of the estates devised in trust for *Thomas*, should be applied in payment of the 1,000*l.* and interest, until *Thomas* would have attained the age of twenty-six.

Page 143

3. *E. W.* devises to his second son, *Thomas Wigge*, and his heirs, certain lands, upon condition to pay to his grandchildren (the children of the said *Thomas*) 90*l.* to be equally divided amongst them, and on default of payment, then that they might enter, hold, and enjoy the premises; *Thomas* died in the testator's lifetime; the son of the eldest son of the testator entered on the lands as heir at law, and sold them; the legacy to the children of *Thomas*, the testator's second son, is a continuing charge on the lands in the hands of the purchaser, and they are entitled to be satisfied for the same with interest.

677

4. Where a testator gives an estate to his wife for life, with remainder to his son in fee, and directs that he shall, when he comes into possession, as well of the estate devised as of another estate of which he was tenant in tail, pay to the testator's daughter a legacy; held, that though the son never comes into possession of the estates, that the legacy is a charge upon the estate devised, into whatever hands the estate comes.

707

See DEBT, REAL ESTATE.

CONSIDERATION.

A widow who had two children by a former husband, and these two children, each of them a child, and being entitled after the death of her mother, to certain freehold, copyhold, and leasehold estates, by articles before her second marriage, to which her

husband was a party, and with his consent, covenanted that trustees should stand seised of the freehold, copyhold, and leasehold estates, if no issue of the marriage, in moieties; one to the plaintiff, her grandson, his heirs and assigns, the other to her grand-daughter in fee; provided, if there should be any child or children of the marriage, such child or children, to have an equal share of the said estates with the grandson and grand-daughter; the husband and wife afterwards mortgage the estates to persons who had notice of the articles; declared that the articles are no voluntary agreement, but a binding one, and that it was not fraudulent and void against subsequent purchasers or creditors.

Page 287

CONSTRUCTION.

1. A testator after disposing of his real estate, and giving a general legacy of 100*l.*, gives all his moneys not otherwise by his will disposed of to his younger children, and the residue of his personal estate to his wife. Under the word "moneys," East India stock passes to the children. 172
2. *R. L.* devises to *R. M.* eldest son of his nephew *R. M.* and the first heirs male of his body, and the heirs male of his body, and in default of such issue, to the second son of the said *R. M.*, and the heirs male of his body, and their issues, remainder over, &c. These words, "the second son of the said *R. M.*" do not mean the second son of the devisee, but *John*, the second son of the testator's nephew *R. M.* 250
3. Sir *Edward Nichols* being entitled to the advowson of *Hardwicke*, by his will devises to his trustees and their heirs all and singular his messuages, cottages, closes, farms, woods, lands, tenements, and hereditaments, lying in *Hardwicke*, &c. and all other his lands and tenements whatsoever not before devised, with their appurtenances, upon trust to pay 30*l.* per

to wait upon the inheritance. This is a conditional limitation in the wife, taking place as an executory devise, and the freehold descended to the son as heir at law to the testator, till the four years were elapsed or his wife had performed the condition, as a part of the inheritance undisposed of; and by this devise the son hath a good estate tail in the inheritance expectant on the determination of the term of ninety-nine years

Page 176

2. *Richard Norton* being seised to himself and his heirs of a church lease for three lives, on his second marriage, by a settlement made in 1657, covenants to levy a fine thereof to himself for life, with remainder as to part thereof to the first and other sons of the marriage in tail, and as to other part thereof to the use of such children, and for such estates as he should by deed or will appoint, and for want of such to the use of the first and other sons of the marriage in tail, remainder to his own right heirs. By a settlement made in pursuance of articles upon the marriage of the eldest son of the second marriage, who was a party to the articles, *Richard Norton* the father, conveys it to the uses of his son's marriage settlement: held, that the estate tail created as to part of the premises in the church lease by the deed of 1657, was well barred by the articles and settlement made upon the son's marriage, the church lease not being within the stat. *De Donis*, and that the other part of the premises in the church lease, was in pursuance of the power of appointment contained in the deed of 1657, well appointed by the same articles and settlement, but that at any rate it was not competent for the plaintiff, who was the next in remainder, in case the articles and second settlement had not been made, (having agreed with Colonel *Norton*, his eldest brother by a former marriage, that the lease should be renewed in the name of Colonel *Norton*, in his own name, and in the name of his

eldest son,) to bring a bill for an account of the rents and profits which had accrued in Colonel *Norton's* lifetime

Page 203

3. A devise of personal estate to *A.*, and the heirs of her body, it has never been solemnly determined, that where money is so entailed, the whole shall go to the first taker
- 263
4. *R. W.*, by his will, gives to his wife *Elizabeth*, all his lands not settled in jointure. And if it shall happen that his wife has no son or daughter by him, and for want of such issue, then the said premises to return to his brother, if he shall be living, and his heirs for ever, paying to *A.* and *B.* 150*l.* within one year after her decease. Held an estate tail in *Elizabeth*, and that the subsequent words do not controul the legal operation of the precedent words creating an estate tail
- 308
5. *Lord Chancellor* of opinion as to an annuity devised to *Robert*, and afterwards to *John* for life, &c., that there being words of limitation annexed, such as would create an estate-tail in the case of a real estate upon the birth of the son of *John*, the whole interest in the remainder vested in such son; and that *John*, as administrator to his son, is absolutely entitled to it; and as to this demand, dismissed the bill.
- 319

ESTATE FOR LIFE.

1. *A.* devises several leasehold estates to two trustees, in trust, if his granddaughter married without their consent, to convey the premises to two other trustees, in trust for her separate use during her life, and after her death, for the use and benefit of her issue. Though she has no children by her first husband, she has only a right for her life, for the issue by any husband are provided for by the settlement.
- 72
2. Sir *J. L.* gives by a codicil to his will, to his niece during her life, his house, with the household goods, &c. that

wife to raise money for the payment of his debts; the term, though subsequent, shall take place of the wife's estate for life, in case of a deficiency of personal estate to pay debts.

Page 164

See CHARGE, MORTGAGE, REAL ESTATE.

DEBTOR AND CREDITOR.

A suit cannot be maintained by a creditor or legatee against a debtor to the testator's estate. 169

DEEDS.

1. Particular acts of excessive drinking by a party executing a conveyance not a sufficient ground to set aside a conveyance; nor inadequacy of price alone where there is no fraud, especially where the person claiming against the conveyance has allowed fifteen years to elapse without taking any step. 90

2. *Elizabeth Mason* being at the time of her marriage in treaty for an estate, it was agreed by marriage settlement, that if the purchase could be obtained, that the purchase-money should be paid out of her fortune, and the estate when purchased should be settled upon the husband and wife, and the issue of the marriage; but if the purchase could not be obtained, then the husband covenanted that he would lay out 500*l.* part of *Elizabeth's* fortune in the purchase of other lands, to be settled to the same uses. Upon the marriage settlement which was executed in the usual manner, an indorsement was made before the sealing and delivery of the deed, by which it was declared by all parties, that if the particular purchase could not be effected, that then the husband should not be obliged to lay out the sum of 500*l.* or any other sum in the purchase of any other estate. The indorsement was not signed by the parties, but the attestation of the witnesses was annexed to it:

Held that the indorsement, though neither signed nor sealed by the parties, but only attested was part of

the deed having been made before the sealing and delivery of the deed.

Page 557

See EVIDENCE, 7.

DELEGATES.

1. Where, by the sentence of the Court of Chivalry, it was decided, that pedigrees entered in the books of the College of Arms need not be signed by the parties requesting such entries to be made, for the purpose of making them valid: this Court will not grant a Commission of Delegates upon an appeal from such sentence, this sentence being neither a definitive sentence, nor such a sentence as is termed in the civil law *gravamen irreparabile*. 25
2. A person aggrieved by, or interested in a sentence in the Ecclesiastical Court may have a Commission of Delegates, though he was no party to the original suit. 632

DEMURRER.

1. On arguing a demurrer to a bill of review, what appears on the face of the decree can be read only, but after a demurrer over-ruled, a plaintiff may read any evidence as at a rehearing. 447
 2. Demurring for want of jurisdiction is improper. A defendant should plead to the jurisdiction. 566
- But see the note subjoined. *ib.*

DISCHARGE.

- F. D.* by her will, devises an estate to her grandson, upon condition that he first paid to her grand-daughter 1,000*l.* at the age of twenty-one, or marriage, and charged the estate therewith, and empowered her executor to raise the same out of the rents and profits of the estate, and to keep the same in his own possession till it should be paid, and in the meantime to pay her interest to commence after the payment of a mortgage debt upon the estate; the executor entered into possession of the estate, and received sufficient rents

Chesshyre and her husband were competent witnesses in support of the settlement, as at the hearing of the cause no decree could be made against her, being not interested in the event of the suit; nor could any decree be made against him so as to affect him with costs; and even if his wife had been guilty of a fraud, he being innocent and deriving no benefit from the fraud, could not be made to pay costs. *Page 438*

6. The defendant gave a bond to the plaintiff conditioned to pay her 500*l.* if he did not marry her within twelve months. The defendant by his answer denied that he had ever promised to marry her, and that she gave up the bond to him voluntarily, in contradiction to the bill wherein it was stated that he had fraudulently taken it away from her and destroyed it; upon evidence by one witness that the defendant had taken away the bond forcibly, and of another that he had promised to execute a new bond; it was held, that the plaintiff was entitled to the 500*l.* with interest from the filing of the bill. *589*

7. *Barbara Graham*, by her will, gives to her brother, *John Graham*, 300*l.*, to be paid to him six months after the decease of her mother and sister; *John Graham*, by indenture, in consideration of 100*l.* assigns to *Thomas Haughton* his legacy of 300*l.*, and the receipt for the 100*l.* is indorsed upon the indenture, and gives a warrant of attorney to confess judgment, which was entered up for 600*l.* to be void on payment of the legacy; upon a bill brought by *Thomas Haughton* against the representatives of *Barbara Graham* for the payment of the legacy; the defendants insisting by their answer, that the consideration of 100*l.* was not paid, and *Thomas Haughton* having proved in the cause the loss of the indenture, a copy of the indenture, and that a receipt for the 100*l.* had been indorsed thereon; the *Master of the Rolls* referred it to the Master to inquire into the consideration of the assignment; but the *Lord Chancel-*

lor upon appeal, reversed the decree, and directed the legacy to be paid to the plaintiffs by the defendants, out of the personal estate of *Barbara Graham* the daughter. *Page 705*
See DEEDS, 2. AND FRAUDS STATUTE OF, 2.

EXONERATION.

See DISCHARGE, EXECUTOR, 3, AND FRAUDS, STATUTE OF, 2.

EXECUTORY TRUST.

Sir *R. S.*, by his will, devises certain estates to trustees upon trust, subject to certain charges, to convey one fourth part thereof in trust for the separate use of his daughter *Priscilla*, for her life, and so as she alone or such persons as she should direct, might receive the rents and profits thereof to her sole and separate use, *her husband not to intermeddle therewith*, and after her decease, in trust for the heirs of the body of the said *Priscilla*, for ever; and also upon trust to convey the remaining three-fourths to his other three daughters, and the heirs of their bodies; and he declared that if any of his daughters should die without heirs of their bodies, the part or share of her or them so dying, should be conveyed to the use of his surviving daughters, equally to be divided, and the heirs of their bodies, but the share of his daughter *Priscilla* to be conveyed in trust, as aforesaid, and if all his daughters died without issue, and there should be no issue left of his body, then to his own right heirs for ever; *Priscilla* having died, leaving a husband and two sons, and part of the lands devised being gavelkind: held, that *Priscilla* took only an estate for life in the lands devised to her, the trusts as to her being merely executory, and that her eldest son took as purchaser an estate tail, both in the gavelkind lands, and lands in socage.

EXECUTOR.

1. If an executor has paid simple contract debts in preference to a bond debt, of which he had notice he must pay costs *de bonis testatoris, si non de bonis propriis*. Page 19
But see the note subjoined.
2. The administrators of *J. H.* empower the defendants, by joint-letters of attorney, to get in an intestate's effects in *Flanders*. One of the administrators (being the father of the defendants) afterwards settles the account with them, without the privity of the other administrator, executes general releases, and dies. Upon a bill brought by the surviving administrator against the defendants, the releases executed by their father, being unfairly obtained, were set aside. It seems that the release of one administrator will not bind the other; but it is otherwise in the case of an executor: and it seems that the release of one administrator to two persons, acting under a joint power of attorney, will bar the other at law; but being obtained by fraud, will be set aside in equity. 155
3. *William Fox* mortgages his estate to *Thomas Fox* who paid no money; but gave a bond to *William* for 130*l.* *William Fox* by his will makes *Thomas* his residuary legatee, and appoints him his executor. Upon a bill filed by the heir at law of *William*, against *Thomas*, to have the real estate exonerated from the mortgage debt, it was held, that the bond debt was not extinguished in equity; and that the debt due from the executor must be brought into the account of the testator's personal estate, and after the payment of the other debts, funeral expenses, and legacies, the testator's personal estate was to be applied in satisfaction of the mortgage debt. 162
4. If an executor, to an action brought against him on a bond, pleads *non est factum*, and there is a verdict against him. This Court upon a bill brought by the executor to injoin the action on the bond, and to be relieved, will only relieve against the penalty in the

- bond, upon payment by the executor of principal and interest due in respect of the bond, and the costs incurred both in law and equity, without regard to whether the executor had assets or not to pay the principal and interest on the bonds. Page 237
5. Where a father, upon the marriage of his daughter, gave a bill of exchange for 1,200*l.* as a marriage portion, and the husband agreed to settle it upon his daughter in three or four years after the marriage; the daughter and her husband having been lost at sea within three years after the marriage; it should seem that the representative of the husband had a better right to receive the 1,200*l.* than the representative of the daughter. 445
 6. *Sir Richard Billings* being entitled to a sum of money due upon mortgage, by will makes his son sole executor and residuary legatee, and dies in the month of October, 1716. In September, 1718, the executor assigns the money due upon mortgage to *William Knight*, for the purpose of satisfying his own debt. Held, the assignee having no notice of any debt due to the testator, it was a good alienation against the creditors of the testator, though it was an assignment of an equitable interest in the assets, and though the assignee had notice that it was part of the testator's assets. 494
 7. Executors cannot bring a bill to compel their co-executor to pay to them money due from him to the estate of their testatrix, unless under special circumstances. 556

EXHIBITS.

This Court will allow the proving of exhibits *viva voce* at the hearing, but not to let in other examinations, and this only at the application of the party who is to make use of the exhibits; but no instance where it is allowed on the application of the contrary party. 44

F.

FINE.

1. An infant *feme covert* is enabled to convey by fine within the meaning of the 7th of Anne c. 19. Page 569
2. Under a settlement it was provided, in the events which happened, that J. B. and his heirs should within one year after his wife's death, pay 100*l.* to such person as she should by will appoint, and in default of payment, that it should be lawful for J. M. and his heirs to raise the same, with interest, by making leases of certain lands; the wife by her will appoints the 100*l.* to be paid in trust for the plaintiffs; the heir of the husband levies a fine of the estate mortgages and releases the equity of redemption to the mortgagee: held, though five years had passed subsequent to the levying the fine, without any demand having been made, that the plaintiffs were entitled to the 100*l.* with interest, and not barred by the fine, the power of leasing being a naked power in a stranger, not party or privy to the fine. 584

See ESTATE TAIL.

FRAUD.

See CONSIDERATION. EVIDENCE, 4.
MARRIAGE SETTLEMENT, 2.

FRAUDS, (STATUTE OF).

1. A. agrees for the purchase of an estate, but the agreement not reduced into writing; though A. in confidence thereof gave orders for conveyances to be drawn, and went several times to view the estate, this Court will not carry such agreement into execution, and the statute of Frauds may be pleaded to a bill brought for that purpose. 261
2. Edward Heather by his will gives

an annuity of 20*l.* to his daughter and the heirs of her body and appoints his son executor, who by his will gives to her and her daughter an annuity of 20*l.* to be paid out of real estate; and by an indorsement upon the will with a pencil, "Directs that this annuity shall not be taken for another 20*l.* annuity, but to confirm the 20*l.* per annum, left her and her daughter by her father;" Held that the daughter was not entitled to both annuities; not upon the ground that the indorsement being unattested could affect the real estate charged with the annuity; but by way of exoneration of his father's personal estate, he being the only person chargeable by way of personal demand as the executor of his father. Page 345

G.

GIFT.

Mary Lucas in her last illness requested of her husband that her wearing apparel, gold watch, pearl necklace, rings, &c. in her possession, and used by her, might be given to her daughter, and put into a friend's hands for her daughter's use, which the husband promised; and, after his wife's death, gave the said things to his daughter, and made an inventory, and locked them up in a strong chest, and gave the key to his wife's friend, and sent the things therein to her for his daughter's use, though the husband afterwards took some of the things into his possession again, that is not sufficient to invalidate the gift, which was perfect by the former act. 456

GUARDIAN.

A mother being appointed by her husband's will the guardian of her children, by deed agrees to permit her father being of the Jewish religion, to have the care and education

of her children; the mother who had been converted to christianity, and the children, both present petitions that they may be restored to their mother. The petition of the mother is dismissed; but upon the petition of the children, the grandfather is ordered to deliver over the children to the care of their mother.

Page 299

H.

HEIR.

1. Where after making a will, a person agrees for the purchase of particular lands, if a good title cannot be made, as the heir at law cannot have the land, he shall not have the money intended to be laid out. 563

2. *Mary Briggs* being entitled to a lease to her and her heirs for three lives, devises the same to her daughter and directs that the trustees shall manage her estate for the benefit of her daughter either by placing her monies out at interest or by making purchases; The trustees upon the decease of one of the lives in the lease agree with the dean and chapter of *C.* the lessors, that the existing lease should be avoided by forfeiture for non-payment of rent, and that a new lease should be granted for the benefit of the daughter; the old lease having been avoided by forfeiture, a new lease is granted to the trustees in trust for the daughter and her heirs, which new lease is afterwards surrendered in consideration of a similar lease; the daughter dies an infant, the lease shall go to the heirs of the infant *ex parte paternâ*.

711

See REAL ESTATE.

HOTCHPOT.

Part of the testators personal estate, in the events which had happened, being undisposed of; held, that it should be divided amongst the next

of kin, according to the Statute of distribution; and that the testator's daughter being advanced in marriage, that her representative should not bring into *hotchpot* the advancement made to the daughter upon her marriage.

Page 328

I.

INFANT.

1. A. infant being in contempt to an attachment for want of an answer upon production of the attachment, a messenger ordered to bring the infant into Court, the attachment not having been served, or the return out. 131

2. Where any person enters upon an infant's estate, and continues the possession, this Court considers him as a guardian, and will decree an account, and to be carried on after the infancy is determined, unless the infant after being of age waived such account. 265

See ELECTION, 2, GUARDIAN, NEW TRIAL, REAL ESTATE, 2, SATISFACTION, RECEIVER.

INFORMATION.

1. *Dr. Stevens* having been elected under *Dr. Ratcliffe's* will a travelling-fellow, receives the salary for five years, and instead of travelling abroad for five more as the will requires, upon ill health resigns, after having been absent from *England* only six weeks, and the trustees accept the resignation, and put another in his room, This is a dispensation with the condition; it might have been otherwise if they had refused to accept the resignation. 50

Whether the travelling-fellows must be members of a particular college, and whether they have power to let their chambers, are not objects of the Court's decision, but ought to be determined by the visitor. *ib.*

2. Where by a royal charter two markets, two fairs, a court-house, and a booth-hall for the sale of merchandizes, together with the tolls and profits of the market are granted to a corporation to be held *ad usum et proficuum burgi et burgentium*: This cannot be considered as a grant for a charitable purpose, but must be applied to the public use of the corporation; but to what uses it must be applied the members of the corporation are the judges uncontrolled by this court. Page 55

A decree in a suit against a corporation made with their consent upon a report of two judges of assize, to whom the court had referred it, cannot, upon an information founded upon that decree be varied, the corporation by their plea and answer relying upon that decree. ib.

Where the funds of a charity had not been applied or the accounts passed pursuant to the directions of a decree; under the circumstances of there then being no fund, and of the present members of the corporation having only followed the steps of their predecessors, and in order to avoid litigation and expense, the court directed the accounts to be taken from the period of six years before the filing of the information. ib.

3. By letters patent, three of twelve governors, together with the assent of the major part of the inhabitants of *Sandford* were empowered to nominate and appoint a chaplain for the village or hamlet of *Sandford*, and with the like assent to remove him on reasonable cause. One of the three governors with the assent of the major part of the inhabitants appointed one person; and the other two of the three governors, with the assent of a smaller number of the inhabitants, appointed another person to be chaplain—both appointments were held invalid:—but where a chaplain was appointed by two of the three governors, with the approbation of the major part of the inhabitants, but the other of the three governors refused to join in the ap-

pointment,—such appointment was held valid. Page 121

Ses CHARITY.

INJUNCTION.

1. Though this Court cannot on petition prohibit the Ecclesiastical Court, yet it will restrain a person who has married clandestinely a ward of this Court from proceeding in an excommunication against the guardian and against the infant, either for restitution of conjugal rights or alimony. 195
2. The Court will not restrain defendants who have an interest in the manor of *Tunbridge*, from proceeding at law against the plaintiffs for building houses on the manor without leave, in order that the defendants may accept such compensation as the Court shall think reasonable 513
3. Perpetual injunction decreed against a defendant from proceeding against plaintiffs, to recover, in ejectment, possession of premises, the right to which had been established against him upon a trial at bar, and upon a decree made in both the causes (to one of which he was a party) for giving effect to the verdict; though he insisted by his answer that many witnesses had not been examined, and an entry in a registry-book not produced at the trial at bar, through the neglect of his attorney; but it appeared likewise in the cause, that there were strong grounds for believing that an entry in the registry-book, to prove his title, was forged by his procurement. And it is no objection to the plaintiffs' instituting a suit against the defendant for a perpetual injunction, that they were only co-defendants with him in that suit to which he was a party. 693

INROLLMENT.

1. A bill of review cannot be brought until the decree it seeks to impeach is signed and enrolled; but a party

not bound to sign and enroll a decree against himself for the purpose of bringing a bill of review, but he may bring a bill in the nature of a supplemental bill, and have the former cause re-heard at the same time.

Page 194

2. The Duke of *Buckingham* devised his real and personal estate to trustees, upon trust for his only son, *Edmund*, and his issue; and in case he died without issue, upon the like trust for *Charles Sheffield*; and in case he died without issue, in like manner to *Charlotte* and *Sophia Sheffield*; in Easter Term, 1721, Duke *Edmund* instituted a suit against the trustees and executors of his father's will, *Charles Sheffield*, *Sophia* and *Charlotte Sheffield*, for an account of the rents and profits of the estates devised by his father's will, and an allowance thereout for maintenance; in the July following, another suit was instituted by *Charles Sheffield*, *Sophia* and *Charlotte Sheffield*, against Duke *Edmund* and the trustees and executors under the will, for carrying into execution the trusts of the will; and by a decree made in both causes, it was declared, that the will was well proved, and that the trusts ought to be carried into execution; on the 30th October, 1735, Duke *Edmund* died an infant; on the 13th March, 1735, the suit was revived by *Charles Sheffield*, against *Charlotte* and *Sophia Sheffield*, and their husbands, the same having become abated by their marriages; and on the 8th May, 1736, the decree made in both causes was signed and enrolled: held, though Duke *Edmund* was dead at the time of the enrollment of the decree, and before the suit had been revived against his heirs at law, that the enrollment was regular, there being material parties living at the time of the enrollment of the decree.

673

INTEREST.

1. A judgment creditor not entitled to interest under a decree in this Court.

Page 132

2. Where by a decree further directions and costs, but no directions as to interest are reserved; yet the Court upon the cause coming on upon the equity reserved has power to give interest

490

See MAINTENANCE, 2, PORTIONS, 4.

J.

JOINT TENANTS, AND TENANTS IN COMMON.

1. *Sarah Ward*, being entitled to real estate, and as joint-tenant with her sister, *Elizabeth Powlet*, to personal estate, amongst which were mortgage securities, by settlement upon her marriage, after reciting that it had been agreed by her husband that she should enjoy to her separate use and disposal her real and personal property, and for want of such disposal, and for want of issue of her own body, her heirs and next of kin respectively of her own family should have and enjoy the same, conveys her real estate to the uses of the settlement, but makes no assignment of the personal property. The whole of the money due upon one of the mortgage securities, called *Cutfield's* mortgage, was received by her husband, who together with his wife gave a note promising to be accountable to *Elizabeth* for half the sum upon *Cutfield's* mortgage, and interest until *Newland's* and *Croucher's*, two of the other mortgages, were made over to *Elizabeth*: held, that there was a severance of the joint-tenancy as to *Cutfield's*, *Croucher's* and *Newland's* mortgages; but that the settlement was no severance of the joint-tenancy of any part of the personal

- estate; and that there was no severance as to the joint-tenancy of one of the mortgages, by one of the joint-tenants having advanced an additional sum to the mortgagee, and taken a conveyance in her own name. *Page 4*
2. A testatrix devises two houses to *J. P.* and *J. H.* generally, and then says, my meaning is, that the rents of my two houses should be equally shared between *J. P.* and *J. H.*; the devisees shall take as tenants in common, and not as joint-tenants. 271
 3. *E. B.* after giving various legacies, as to the residue of her estate, gives the same to her two nieces, and desires their father and mother to be their trustees, and declares her will to be, that her estate should be equally divided between them, and appointed them her executrices; one of the nieces having died in the lifetime of the testatrix: held, that the two nieces took the residue as tenants in common, and that the moiety of the residue being undisposed of was a lapsed legacy, and must go to the next of kin. 593

JUDGMENT.

See INTEREST 1.

JURISDICTION.

1. An original independent decree may be had in this Court, where all the facts are stated by the bill, notwithstanding a former decree for the same matter in *Wales*. 181
2. While a suit is depending in the Ecclesiastical Court for an administration, a bill may be brought here for an account of the personal estate. The reason why a bill is allowed to be brought before probate, is that the Ecclesiastical Court have no way of securing the effects in the mean time. 263
3. An insurance having been effected by the defendant *Johnson* with the plaintiffs on a ship and cargo from *Ostend* to *Canton*, was seised by the

East India Company at *Bencoolen*, as an illicit trader; *Johnson* recovered in an action on the policy against the insurers and obtained judgment; upon a bill by the insurers against the defendants to be relieved against the verdict and judgment, or that the insurers might stand in the place of *Johnson* to receive satisfaction against the *East India Company* for any unlawful capture made by them: held, that they could not be relieved against the verdict and judgment; for if the seizure were lawful that would have been a good defence to the action; and that the insurers could not stand in the place of *Johnson* to receive satisfaction against the *East India Company*, as there was no proof in the cause against the Company, that *Johnson* had any interest or property in the ship or goods *Page 266*

4. Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it, against five different lords of manors, and between whom and the plaintiffs there is no privity, nor any general right on the part of the defendants, may bring a bill to be quieted in the possession, and to have his right established, though he has not established his right at law; and it is no objection upon a demurrer to such bill that the defendants have distinct rights, for upon an issue to try the general right, they may at law take advantage of their several exemptions and distinct rights. 293
 5. This Court will not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, because it can come at discovery itself. 526
 6. This Court has no jurisdiction to put a person into possession of lands in *St. Christopher's*. 565
- See* ACCOUNT, 4; AND INJUNCTION, 1.

L.

LEGACIES.

A testator gives to his grand-daughter a legacy, to be paid to her at twenty-one or marriage, but if she dies before, then he gives the same to his executor. Upon a bill for interest, and to secure the principal; it was held, she was not entitled either to the interest, or to have the principal secured. Page 161

But see note subjoined.

LEGACY (LAPSED).

Where a testator devises all his lands to trustees upon trust, to sell a certain specified part, and with the money arising from the sale to pay debts, and as to the residue to receive the rents and profits, and by granting leases for three lives, or ninety-nine years, determinable on three lives, to pay all his debts and legacies, and subject thereto, he devises the same to *J. A.* in tail male, and gives to his nephew 500*l.*, to be paid at twenty-one or marriage, and makes his trustees executors; the nephew having died before twenty-one, and unmarried, and the personal estate, and the money arising from the sale of the estate devised to be sold, being insufficient for the payment of debts; held, that the 500*l.* legacy could not be raised, and that the Court would not marshal the assets by throwing the debts upon the real estate, for the purpose of paying the legacy out of the personal estate, the legatee having died before the time of payment. 312

LEGACY (SPECIFIC).

1. A testator having 500*l.* upon mortgage, and no other sum out upon security, gives by will to the defendant 500*l.* to remain and continue at

interest on such securities as he should die possessed of, or to be put out on government securities, at the election of his executors. Held, a pecuniary legacy. Page 325

2. Where a testator, by his will, gives all his South Sea Stock, South Sea Annuities, and South Sea Bonds to his wife, in trust that she should pay certain legacies therein mentioned, and all the rest and residue of his estate not before bequeathed, he gives to his wife; the legacies shall only be paid out of the South Sea Stock, South Sea Annuities, and South Sea Bonds, and shall not be considered as general legacies, payable out of the other assets of the testator. 442

3. *Robert Rowland*, by his will, after stating that he intends to dispose of his estate, gives his real estate and two several legacies to his nephew, *Robert Snablin*, and then gives to his niece, *Anna Maria Snablin*, 3,000*l.*, also to his niece *Ann Snablin*, 5,000*l.* in the Old Annuity Stock of the South Sea Company; *Item.* To his niece *S. Swynburne* 3,000*l.* in the New Annuity Stock of the South Sea Company; *Item.* To his cousin, *Robert Purse*, 5,000*l.* in the Old Annuity Stock of the South Sea Company; and after other bequests, gives the residue of his real and personal estate to his nephew, *Robert Snablin*, and appoints *Robert Purse* his executor; at the times of making his will and of his death, the testator was possessed of only one sum of 5,000*l.* in the Old Annuity Stock of the South Sea Company; held that the two legacies of 5,000*l.* in the Old South Sea Annuity Stock are not specific legacies in the strict sense of the term, but are separate and distinct legacies, to be made good out of the personal assets of the testator. 470

LEGACIES (VESTING).

1. A testator bequeaths to his daughter 200*l.* to be paid to her at the time of her marriage, or within three months

after, provided she marries with the consent and approbation of his two sons, or the survivor, and he directs that his daughter until marriage, shall yearly receive the sum of 12*l.*, and he charges a leasehold estate with the payment of the yearly sum of 12*l.*, and also of the said sum of 200*l.*, when the same shall become due as thereinbefore is appointed; his daughter having died without having been married: It was held, that this legacy was not vested, and not transmissible to her representative. *Page* 114

2. *Michael Terry* devises to his nephew and his heirs the moiety of an estate, subject to his, the testator's, wife's life estate, so as his nephew should, within one year after the estate should come to him, pay amongst other sums, to *Elizabeth Oades* 100*l.* and charges the estate with the payment of the same; *Elizabeth Oades* dying in the lifetime of the wife; held that *Elizabeth's* representative was not entitled to the 100*l.* 500

3. If a legacy is given to one payable at a certain age, and if he dies to another, without mentioning any age, if the first dies before the time of payment, it vests in the second immediately 524

4. *M. C.* by her will devises all her real and personal estate not otherwise disposed of to *G. C.* and directs that out of the real and personal estate *Thomas Lewis* should be paid 2,000*l.* upon trust, until his daughter attained eighteen or was married, to place it out at interest; but when she attained that age or was married to pay the same with interest to his daughter; and she directed that the 2,000*l.* should be paid within one year and a half after her decease, and she charged her house in Lincoln's Inn Fields, in the first place with the payment of the said sum of 2,000*l.* *Mary Lewis*, the daughter of *Thomas Lewis*, having died half a-year after the testatrix; held that the legacy of 2,000*l.* was not a vested legacy and her representative was not entitled to it. 699

LIMITATIONS (STATUTE OF).

1. A bill depending six years in Chancery not sufficient to take a debt out of the Statute of Limitations. *Page* 20

2. The Statute of Limitations will run, notwithstanding the appointment of a receiver. 299

3. An award under the hands and seals of arbitrators is not within the Statute of Limitations. 567

LUNATIC.

A lunatic being tenant for life, with a power to grant leases, the *Chancellor* cannot authorise the committees to execute this power. 133

But see the note subjoined.

M.

MAINTENANCE.

1. Where a father is sufficiently competent, the Court will give no directions with regard to an infant's maintenance! 34

2. By marriage settlement it is provided, that if husband and wife shall die, leaving issue besides an eldest son unprovided for, then it should be lawful for the trustees to enter upon the estate, and receive all the rents and profits thereof, until they had received 200*l.*; and the estate was afterwards declared to be charged with raising this sum for the use, maintenance and support of such children so unprovided for, in such manner and such proportions as the survivor of the husband and wife should appoint. The wife survived, and appointed the 200*l.* for a daughter, the plaintiff's wife, being a child unprovided for; Sir *Joseph Jekyll* decreed the 200*l.*, and interest by way of maintenance from the death of the mother. Defendant appealed from that part of

the decree which allows interest, and decree affirmed. *Page 217*

MARRIAGE SETTLEMENT.

1. By articles before marriage husband and wife agree, in consideration of 2,000*l.*, the wife's portion, to release all right which they might be entitled to in respect of her father's personal estate by the custom of *London*; this agreement, though never carried into execution by the husband, and entered into when his wife was an infant, shall bind and prevent her claiming any further part of her father's personal estate; and the wife's right to the orphanage part shall go to increase the whole general estate of the father; and the rather as the release is to be made to the executors who represent the whole estate. 82
2. *German Hammond* being tenant for life of a freehold, and a leasehold estate called *Ford*, with remainder to his son in tail, and being absolutely entitled to another leasehold estate, joins with his son after his marriage in making three settlements of the three different estates, all the settlements being of the same date; by the first settlement, in consideration of 200*l.*, part of the wife's portion paid by her father, they join in settling upon the son and his wife, and the issue of the marriage, the freehold estate; by a second settlement, in consideration of 100*l.* being the residue of the portion paid soon after the execution of the settlement, they make the same settlement of the *Ford* estate; and, by a third settlement, the other leasehold estate in which *German Hammond* had an absolute interest, was assigned upon trust, to secure *German Hammond* and his wife an annuity of 25*l.* during their joint lives, and after the death of one of them, to pay 13*l.* to the survivor, and subject thereto to the son and his wife for their lives, with remainder to such uses as the survivor might appoint; the father and son being both indebted at the time of the exe-

cution of these settlements, it was held that the first and second settlements were not within the statute of the 13th of *Eliz. c. 5.* fraudulent as against their creditors, but that the third settlement was fraudulent against their creditors, there being no pecuniary consideration to support it, and the father's reservation of an annuity to the value of the leasehold estate being a strong badge of fraud.

Page 530

MARRIAGE.

1. Where a settlement was prepared whereby the father agreed to settle upon his son who was unprovided for, and his wife and the issue of the marriage certain lands; but previous to its execution refused to execute it unless the son gave him a bond, to which the son having objected at last consented and privately executed the bond; the Court relieved against the bond. 88
2. Where a testator by his will gave his personal estate to his executors, in trust for the use of his niece *Elizabeth*; but in case she married before she attained twenty-four, without their consent, then he gave his personal estate to his executors in trust, to be disposed of and given to any child or children which then should be lawfully born of his niece *Jane*, or her eldest sister *Mary*, at the discretion of his executors or major part of them: held, upon the marriage of *Elizabeth*, before she attained twenty-four, without the consent of the executors, that she had forfeited her right to the testator's personal estate. 96
3. Upon a question whether the chaplain of *Christ Church* had been properly deprived by the dean of *Christ Church* of his chaplainship on account of marriage; it was held that *Christ Church* was both a college or a house of learning, and a cathedral church; and from the chaplains being admitted as members of the college, being prohibited from accepting liv-

ings, except at a certain distance, and of a certain value, and from being obliged to preach in the University, and attend prayers in the Latin chapel, and keep exercises in the house, and have servitors allowed them; but inasmuch as they were obliged to read prayers in the choir, which has necessary relation to the church, it was held that the chaplains were to be considered members of this society in both its capacities, as well in that of a college as that of a cathedral church. And in the absence of any general statute of the University, or any particular statute relating to the foundation of *Christ Church* as a college, it was held, from the general usage of the Universities of *England*, prohibiting fellows from marrying, and from general reputation relating to this foundation, and from particular usage of this society, in like cases, which prohibited students from marrying; that marriage was a lawful cause for a chaplain of *Christ Church* being expelled or removed from his chaplainship. Page 209

4. *Sir Thomas Aston*, by settlement, reserving to himself a power of revocation, conveys certain estates to trustees for a term of years upon trust, in case he shall have one or more son or sons living at the time of his death, and more daughters than one living at that time, or who shall, in his lifetime, be married with his consent, that then it may be lawful for the said trustees, by and out of the rents and profits of the premises, and by such interest, produce, and increase, as shall be made of the same, or by such mortgage or leasing thereof, or such ways and means as to them shall seem meet, to raise, levy, and receive for, and as the portion of every such respective daughter, the sum of 2,000*l.*, and after such respective sum of 2,000*l.* shall be so received and raised, shall and may pay to every such daughter the sum of 2,000*l.* at the respective days of their marriage, with the consent of *Lady Aston*, if living, and being his widow, or if she be dead or married again, then with the

consent of the trustees, or the survivor of them, or the executors, administrators, or assigns of the survivor, and also by and out of the rents and profits of the premises, to pay yearly to each the sum of 50*l.* until the age of eighteen, and after that age, and until their marriage, with such consent as aforesaid, and during the life, and until the second marriage of their mother, 70*l.* yearly, and from and after their marriage, with such consent as aforesaid, or after the death or second marriage of their mother, the yearly sum of 100*l.* until their respective marriages or deaths, which should first happen, and in case of the death of any of the daughters before they should be married with such consent as aforesaid, then the portion shall cease, the estate be exonerated thereof; and if raised, shall be paid to the person entitled to the reversion of the estate, the funeral expenses of such daughters so dying before marriage, to be paid by the person entitled to the reversion; *Sir Thomas Aston*, by his will, directs, that out of other real estates, (which he directs should be accounted as part of his personal estate) and out of all other monies to which he was entitled, certain sums shall be raised and paid to his daughters, to be for the augmentation of their portions, provided by the settlement, to be paid to them at such times, and subject to such conditions, provisoes, limitations, and agreements, as their original portions were made subject to; and in case any of his daughters shall happen to die, their additional portions are not to go to their personal representatives: Two of the daughters of *Sir Thomas Aston*, after his death, having married without the consent of their mother, they were held not entitled either to the original portions provided by the settlement, or the additional portions given by the will.

Page 350

5. *J. Smith* devises a certain real estate to *Lady Clanrickard* for life, with remainder to such persons and for such uses and estates as she should limit and appoint. *Lady Clanrick-*

ard appoints the real estate to her son for life, remainder to his issue, remainder as to a moiety to the plaintiff, her daughter, Lady *Ann*, for life, with remainder as to her sons and daughters in tail male, and provides that if Lady *Ann* should marry without the consent of three trustees or the major part of them, that she and her issue should forfeit her and their right to the estate, and that the next person in remainder might enter and enjoy the same; held that Lady *Clanrickard* might annex to the appointment such condition in restraint of marriage; and that the plaintiff *Daly* being desirous of marrying Lady *Ann*, and having submitted proposals to the trustees for a certain settlement to be made by his father, to the terms of which the trustees having objected, but one of the trustees, at the request of the others, having written to a friend of the plaintiff *Daly's* father, stating that if the father would make the settlement proposed by the son they should be obliged to consent on account of the young people's affections being engaged, and the plaintiffs having married privately without the knowledge of the trustees before an answer was received to that letter; it was likewise held under the circumstances of the trustees not objecting to the family, fortune, or person of the plaintiff, and upon the father's consenting to make the settlement proposed by the son which was in itself reasonable, that the marriage must be deemed a marriage had with the consent and approbation of the trustees. Page 547

MARSHALLING.

See LEGACY LAPSED, PARAPHERNALIA.

MASTER.

Masters in Chancery, in reports, are only to state bare matters of fact. 9

MORTGAGE.

1. Mortgagor cannot be finally foreclosed

until an order absolute be obtained for that purpose. Page 130

2. A mortgagee cannot tack his subsequent bond debt against a second mortgagee, or against creditors. 166
3. *A.* seised in fee of a freehold estate, mortgages it, and afterwards intermarries with *B.*, *A.* dies, and the mortgage is not redeemed during the coverture; this is notwithstanding, such a seisin in the wife, as entitled the husband to be tenant by the curtesy of the mortgaged premises, for in this Court the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor. 221
4. *A.* having mortgaged certain lands, devises them to *R. M.* in tail, and devised other lands to *T. M.*, subject to the payment of his debts, in case his personal estate should not prove sufficient. The mortgage must be paid as a debt out of the testator's personal estate, and, if deficient, out of the real estate so devised to *T. M.* Where a mortgage is made by a person who is owner of the estate, that mortgage is looked upon as a general debt, and the land only as a security; and therefore personal estate shall be applied in discharge, but if the contest lay between *R. M.* and creditors of the testator, it would have been otherwise. 255
5. If a mortgage is found cancelled in the possession of the mortgagee, it is as much a release as cancelling a bond. 527

MORTMAIN.

Sir *William Ashburnham* by his will of the 20th Nov. 1734, devised certain lands to trustees and their heirs for the benefit of certain charitable uses therein mentioned. The statute of Mortmain commenced from and after the 24th of June, 1736; and Sir *W. A.* died in July, 1736: held, by all the Judges, that the devise to the charitable uses was good in law. 505

N.

NEW TRIAL.

Where upon an issue directed to try the legitimacy of an infant, the jury found the infant illegitimate; the Court granted a new trial upon payment of costs. *Page 12*

P.

PARAPHERNALIA.

1. A husband cannot devise away a wife's *paraphernalia*, he can only bar her by acts done in his lifetime. 109
2. A widow is entitled in respect to her *paraphernalia* to marshal assets as against real estates descended; but not as against a devisee. 638

PAPIST.

See DISABILITIES AND DISCOVERY 1.

PARENT AND CHILD.

A father having five children, three of age, and two infants, enters into an agreement with three of them, who were of age, that he should have full power and authority to dispose of his personal estate in such manner as if he was not a freeman of the city of *London*, and they released all right under the custom, and agree not to sue for any part of his personal estate which he may dispose of by will, and to execute releases to his executors. The father soon after the agreement becomes a freeman, and marries a second wife, upon whom he settles part of his personal estate, in bar of what she might claim under the custom; held that this agreement could not operate as a release, the children having neither *jus in re* or *jus ad rem*, nor as an agreement, there being no consideration moving from the parent to the children, and the agreement, as far as regarded the father being nugatory, by two children not being parties to it, whereby the father did not retain an absolute power over his personal estate; and held that

the husband did not become a purchaser of his wife's share of the personal estate; but that the same accrued to the whole estate. And the father upon the marriage of one of his daughters having purchased an estate, which he settled (reserving to himself an annuity) upon herself and her issue, the husband by his receipt acknowledging the purchase-money to be advanced in part of his wife's fortune; held that it could not be considered as a settlement of real estate, but must be considered as money advanced by the father, and that the purchase-money without regard to the annuity, must be brought into *hotch-pot*. *Page 242*

See GUARDIAN.

PARTIES.

1. A husband tenant for life, remainder to his wife for life, he brings a bill alone for the opinion of the Court upon the settlement; objection for want of making the wife a party allowed. 261
2. Upon a bill brought by the Earl of *Thanet* and his son to establish their right as lords of a manor to an arbitrary fine upon the death of the late earl and for the payment by the tenants of the fines which had been assessed;—issues were directed to try the custom; but upon a cross-bill by the tenants of the manor to establish the custom that the fines were certain against the Earl of *Thanet* and his son, and the co-heirs of the late earl, alleging that the co-heirs had entered upon the death of the late earl, and claimed the fines, the cross-bill was dismissed; the co-heirs being out of possession, and therefore not entitled to any fines; and an entry without being pursued by an ejectment not a sufficient reason for bringing the co-heirs before the court. 454
3. Where a testator by his will directs his personal estate to be laid out in land, to be settled upon certain trusts, and subsequent to the date of his will contracts for the purchase of an estate, but dies before it is completed,

the Court will not decide where there is a doubtful title, between the heir at law of the testator and the devisees, whether the contract ought to be carried into effect, without having the vendor a party to the suits. *Page* 561

PERSONAL ESTATE.

See MORTGAGE, 4. REAL ESTATE, 2.
AND WILL.

PIN MONEY.

See BARON AND FEME, 3.

PLEA.

1. To a bill brought for possession of lands in *Scotland*, and for discovery of the rents and profits and deeds, and fraud in obtaining them; plea to the jurisdiction of the court bad, on account of not averring that the parties were resident out of the jurisdiction. 23
2. An insurer by his bill suggests the ship was lost fraudulently, and in the charging part mentioned that, instead of proper goods, there was only wool on board; and, in the interrogating part prays defendant may set out what kind of goods he had on board. The defendant pleads several statutes making it penal to export wool in bar to a discovery of all kind of goods on board; and the plea is allowed, and it was agreed that a plea may be bad in part, and yet not so in the whole. 259
3. Where defendants pleaded a former suit they must shew it was *res judicata*. 512
4. A bill dropped for want of prosecution, is never to be pleaded as a decree of dismissal. 512

PORCTIONS.

1. Where by marriage-settlement it is declared that trustees shall stand possessed of certain terms upon trust,

that in case there shall be no issue-male of the marriage at the time of the decease of the husband or wife, which shall first happen, or in *ventre sa mere* born after his death, or in case the issue-male between them shall die without issue-male, and there shall be a failure of issue-male between them, and at the time of such failure there shall be issue-female living at the time of the husband's or wife's decease, which of them shall first happen, or born in due time after the death of the husband, that then the trustees shall by rents and profits raise the portions of such daughters, to be paid at their ages of twenty-one years, with interest for forbearance if not paid at that time, and for maintenance and education, to be paid them at the end of the first half-year after the decease of either the husband or wife; Held that there being issue-male at the death of the wife who survived her husband, that the contingency had not happened upon which the portions of the daughters were to be raised.

Page 74

2. By marriage articles, 20,000*l.* was agreed to be laid out in the purchase of lands, to be conveyed to trustees to the use of the husband for life, then as to so much as should amount to 800*l.* per annum to the use of his wife for her jointure, remainder to trustees for 500 years, remainder to the first and other sons in tail-male, with a power to the husband of disposing by will or deed of the surplus of the said lands above the said 800*l.* per annum amongst the younger children, remainder to the husband in fee, and the trusts of the term were, that in case there should be issue male of the marriage who should enjoy the inheritance of the premises so to be purchased, 8,000*l.* was to be raised and paid for younger children at twenty-one or marriage, share and share alike, with interest for maintenance until the principal was payable; the father dies; portions not payable till the mother's death. The sense of the words *enjoy the inheritance* being, *enjoy in*

possession. And the husband by his will having mentioned that the provision for the younger children by the marriage articles, was not to take effect till after his wife's death, was held to be further evidence of the husband's intent, where the intent upon the articles was doubtful and ambiguous. *Page 135*

3. Where by marriage settlement the estate of the wife was settled to the husband for life, remainder to the wife for life, remainder to trustees for a term of ninety-nine years, remainder to the first and other sons of the marriage in tail male, remainder to the heirs male of the husband by any other wife, remainder to his heirs in fee, and the trusts of the term were declared to be, that if the husband should have one or more younger son or sons living at his decease, which should respectively attain twenty-one years, then that the trustees should and might out of the rents, issues, and profits, or by sale, of the premises, raise the sum of 5,000*l.* payable at such times, and in such proportions as the husband should by deed or will appoint, and in default thereof to be equally divided amongst them, and to be paid at the age of twenty-one or marriage; and to raise a sum for the maintenance of such children from and after the decease of the husband, until the portions should become payable, the first payment to begin and be made at such of the feasts as should first happen after the decease of the husband. A younger son having attained twenty-one in his father's lifetime, it was held, that he was entitled to have his portion raised in his mother's lifetime, with interest for the same, from the death of his father. *146*

4. By indenture of the 27th of July 1687, Sir *Thomas Cotton* when in possession of a certain estate was empowered to limit any part of the estate not exceeding 500*l. per annum* to a wife, for her jointure, and also to limit any part of the lands not exceeding 500*l. per annum* for raising portions for younger children; the value of

the estate not exceeding 600*l. per annum*, Sir *Robert Cotton* when in possession, by deed in pursuance of his power, charges part of the lands with 500*l. per annum* for the jointure of his wife and by another deed charges the residue of the lands and the reversion of the lands charged with his wife's jointure with the sum of 675*l.* for each of his younger children to be paid to such of them as should attain twenty-one before his death, within one year after his death, and as to such of them as should not have attained that age, to be paid to the sons at twenty-one, and to the daughters at twenty-one or marriage, such respective portions to be paid with interest at 5*l. per cent.* from the time of his death to the time of the payment thereof. Sir *Thomas Cotton* died in 1715. *John S. Cotton* one of his sons died in 1728, having attained the age of twenty-six, and *Vere Cotton* in 1730, having attained the age of sixteen. Held that Sir *Thomas Cotton* under the deed of July, 1687, was empowered to charge the estate *with interest* upon his children's portions before the time at which they were payable. And that the interest upon the portions ought not to accumulate until the time of payment; but ought to be paid annually until the principal became due; and that Miss *Vere Cotton* having died unmarried and under the age of twenty-one, her portion sunk into the estate for the benefit of the heir at law. *Page 520*

See MAINTENANCE, 2.

POWER.

1. Where under letters patent 3,000*l. per annum* was granted out of the hereditary excise, with a power for the grantee, after the commencement of the estate *in possession*, and during the continuance of his estate and interest therein, to appoint part of the premises, so being in his possession, for raising portions for younger children. An appointment made by the

grantee, to commence after his death, was declared void. *Page 106*

2. In 1714, Lord *Bingley* conveys lands at *Cheshunt* to himself for life, remainder to *Samuel Benson* for life, remainder to his first and other sons, subject to a power of revocation by Lord *B.*, if he settled lands in *Yorkshire* of as great or greater value to the same uses; by his will he devises the lands at *Cheshunt* to the plaintiff for her life; and by subsequent deeds, for the purpose of revoking the uses as to the lands at *Cheshunt*, conveys lands in *Yorkshire*, but which are of less value than the lands at *Cheshunt*, to the uses of the deed of 1714. *Robert Benson*, who was the eldest son son of *Samuel Benson*, having refused to take the estate in *Yorkshire*, being of less value than the estate at *Cheshunt*: Held, that the power of revocation was not well executed by Lord *B.*, and that *Samuel Benson* was entitled to the estate at *Cheshunt*, but that he was a trustee of the estate in *Yorkshire* not for the plaintiff, the devisee of the *Cheshunt* estate, who was a volunteer, but for the heir at law of lord *Bingley*. *340*

3. Where a testator having a son and a daughter in pursuance of a power by which he is authorised to appoint, a real estate to the use of his children for such estates, and in such shares and proportions as he should direct, by his will appoints the real estate to his son in fee, upon condition that he should pay to his sister 3,000*l.* wherewith he charged the estate; held, that though the direct terms of the power are not pursued, that the intent and design of it are; and that such appointment to his daughter was a good execution of his power. *536*

4. Where a person having a power to charge an estate with 2,000*l.* after the death of his wife, gives her 1,000*l.* payable with interest three months after his own death; held that the gift of the 1,000*l.* was a good execution of the power, though it could not be raised at the time appointed; and that the interest could not be made good until it amounted to 2,000*l.* for

that would be to charge the estate with the principal sum of 2,000*l.*

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5. *J.S.* devises certain estates to trustees upon trust for his grandson, *John Sanders* for life, with remainder to his first and other sons in tail-male, with like remainders to his grandson, *Thomas Sanders*, and he declared that as his grandsons should come to be in possession of the estates, they might make a jointure for his or their wives respectively, not exceeding 100*l.* per annum for every 1,000*l.*, and he directed his personal estate to be applied by his executors in purchasing lands to be settled to the same uses as his real estate; *John Sanders*, the grandson, enters on the estate upon the death of his grandfather, and by articles covenants that his wife shall have as her jointure certain specified parts of the estates, amounting in the whole to 320*l.* per annum, in consideration of 3,200*l.* for marriage portion, 3,000*l.* of which her mother covenants to pay to *John Sanders* in addition to the 200*l.* he had already received, with interest in the mean time, with a power of revocation to *John Sanders* and *Jane Bailey*. *John Sanders* dies, having in his lifetime received 1,000*l.* in part payment of the portion, and having purchased certain real estate: held, that the power of giving the jointure of 320*l.* per annum was well executed by way of covenant or agreement; but that the deficiency in value, the estates on jointure not amounting to the 320*l.* per annum, was not to be made good against the remainder man; and that the purchase of the real estate could not be considered as a purchase in performance of the trust, there being no proof that the purchase was made out of the personal estate of the grandfather, or in performance of the trust. *686*

PUBLICATION.

1. Where a defendant in a cross-bill, but plaintiff in the original, is in contempt for not putting in an answer, the proper motion is to enlarge publi-

cation in the original to a fortnight after the answer is come in to the cross-bill. *Page 568*

2. After publication plaintiff cannot amend without withdrawing his replication 631
- But see note subjoined to this case.

PURCHASER.

1. Where a defendant claims under a conveyance in which there is an estate-tail prior to the estate under which he purchased it is incumbent upon him to see if that estate is spent, and a plea that he is a purchaser for valuable consideration without notice bad. 23
 2. Where a purchaser has given a full value for an estate, a mistake made by some of the parties to a release of their claims under a marriage settlement, shall not turn to the prejudice of a fair purchaser. 74
 3. Where a purchaser without notice has conveyed to a purchaser with notice, the latter purchaser may plead that the first purchase was without notice. 130
 4. A man who purchases for a valuable consideration, with notice of a voluntary settlement, from a person who bought without notice, shall shelter himself under the first purchase 512
 5. A man cannot defend himself in this court as a purchaser for a valuable consideration under articles only. *ib.*
- See PARTIES, 3.

R.

REAL ESTATE.

1. By will 4,000*l.* is given to *Robert Booth*, to be laid out in land for the use of him and his heirs, charged with several sums and annuities; by a decree in Chancery, this sum was directed to be laid out in land, and in the mean time in the purchase of annuities in the names of the trustees; *Robert Booth* borrows of the plaintiff

500*l.* to be repaid in two or three months, and in a letter to the plaintiff, regrets that he had not been able to pay it, but was disappointed by a gentleman who promised to pay him some of the trust money. Upon a bill filed after his death against his representatives for the purpose of making the 4,000*l.* applicable to the payment of the debt; it was held that the 4,000*l.* must be considered as real estate, and that the plaintiff's demand being a simple contract debt could not affect it, except by marshalling the assets. *Page 441*

2. Sir *R. Walpole* having contracted with the guardian of an infant for the purchase of some timber and bark upon the infant's estate, a reference was made to the Master, in a cause for the administration of that estate, to see whether it would be for the benefit of the infant to carry the contract into effect; the Master having reported that it would; the contract was performed, and by a decree in the Court, the money arising from the sale of the timber and bark was ordered to be laid out in the purchase of land, in trust for the infant, but in the mean time to be invested in South Sea stock, in the name of the guardian. The money having been laid out in South Sea stock, and the infant having attained the age of seventeen, dies, and by his will disposes of his personal estate, but makes no mention of the South Sea annuities; held, that the heir at law of the infant was entitled to the South Sea annuities, and any interest or dividends that had accrued thereon. 449

RECEIVER.

The Court will not appoint a receiver of an infant's estate where there is no bill filed. 347

See LIMITATIONS, STATUTE OF.

RECOVERY.

1. A common recovery suffered in the Court of Common Pleas will not pass copyhold lands, otherwise as to customary freeholds. *Page 464*
But see the note subjoined to this case.
2. R. S. devises his estate to J. C. and his heirs to the use of him and his heirs, in trust to pay debts and afterwards in trust for his grand-daughter *Mary Morgan*, and the heirs of her body, remainder to J. C. and his right heirs upon condition that he married *Mary Morgan*; recovery suffered by *Mary Morgan* barred the remainder to J. C. being the remainder of a trust estate; for the remainder of a legal estate cannot be barred by the recovery of a *cestui que trust*. 635

RELEASE.

A release to one obligor is a release to both in equity as well as at law. 529
See EXECUTOR, 2. PARENT AND CHILD.

REMAINDERS.

See CROSS REMAINDERS.

RENT.

1. Though no demand, or rent paid in thirty years, yet the defendant must pay costs at law to the person recovering there, but none in equity. 233
2. A bill may be brought for rent in this Court where the remedy at law is lost or becomes very difficult, and this Court will relieve on the foundation of payment for a length of time. 651

RENTS AND PROFITS.

1. *William Okeden* by his will directs that his debts and legacies and also the sum of 5,000*l.* due to his daughter should be paid out of his personal estate, but if that should be insufficient then he devises certain estates upon

trust to sell the same or any part thereof, and thereby pay off his debts and the said 5,000*l.*, and such part as should not be sold, and all other his lands he devised to trustees for 300 years with remainder to the defendant, *William Okeden*, for life, remainder to his first and other sons in tail male with like remainder to the plaintiff and his first and other sons; and he declared the trusts of the 300 years term to be that the trustees should receive the rents, issues, and profits thereof, and thereout after paying a certain annuity should apply such sums as they should think fit for the maintenance, placing out, and education of the plaintiff and defendant, his two natural sons, until they should attain the age of twenty-five years, and for raising the 5,000*l.* for the plaintiff, in case he should attain the age of twenty-five; and to apply yearly such sums as should be necessary for the support and reparation of his mansion-house, buildings, and estates, and to pay the residue of the rents and profits to the person entitled to the estate after the term was satisfied; held that the sum of 5,000*l.* given to the plaintiff was not to be raised by sale, but after payment of the annuity and the maintenance was to be paid out of the rents and profits of the estate until *William Okeden* attained the age of twenty-five.

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REVIEW (BILL OF).

Bills of review of two kinds, one for error apparent on the face of the decree, and of course on a deposit of 50*l.*, the other discretionary, upon matter existing before, but come to the knowledge of the party subsequent to making the decree, and is granted upon petition or affidavit. 682

The circumstances of this case not sufficient either in point of form or upon the merits, to grant a petition for a bill of review. *ib.*

And in order to support such a petition the affidavit of the solicitor to the

heirs at law of the infant tenant in tail, that he or the heirs at law had no knowledge of the matter before the decree, is not sufficient; the only question is, whether the infant tenant in tail or his guardians or agents had no knowledge of such matter existing before the decree. *Page 682*

S.

SATISFACTION.

1. *R.B.* by marriage settlement, after reciting that he was entitled to certain Exchequer annuities, that it was agreed that they should be settled upon himself and his wife for their lives, and then in trust for such child or children as he should have by his wife, to be disposed of amongst them in such shares and proportions as he should direct and appoint; and after the decease of himself and his wife without issue, in trust for his executors, administrators, and assigns; assigns the annuities to trustees upon trust, to permit himself and his wife to receive the produce during their lives, and after their decease upon trust, to transfer the said annuities to such child or children of the marriage as he should by deed or will appoint, and in default of such child or children, then to his executors or administrators; *R. B.* by will gives his real and personal estate to his wife subject to the payment of 200*l.* *per annum* for his daughter's maintenance, until she attains the age of eighteen, and then to the payment of 10,000*l.* for her portion; by will the wife gives the residue of her real and personal estate to her daughter in fee; but in case she should die before she should be of an age to dispose thereof, she gave the same to trustees and their heirs, to lay out 6,000*l.* for founding a hospital at *Drayton*; but in case her daughter should die unmarried, her desire was that her daughter should be buried there, and the residue above the 6,000*l.* to be divided amongst her

own sisters and their representatives; held that the daughter, being the only child of the marriage, was under the marriage settlement entitled to the Exchequer annuities, no appointment having been made by her father. That the legacy of 10,000*l.* given by the father's will to his daughter, could not be taken to be in satisfaction for the Exchequer annuities. That the daughter having attained the age of eighteen was entitled to the residue of the personal estate bequeathed to her by the will of her mother; but having died before she attained twenty-one, the contingency had happened upon which the charge of 6,000*l.* for founding a hospital was to take effect; and that the daughter having married, the residue of the real estate, under her mother's will, after payment of the 6,000*l.*, was held to belong to the daughter, as heir at law to her mother. *Page 273*

2. *Nathaniel Hardy* being indebted to his servant for wages, by his will gives to her, in consideration of her great care and trouble about him, during his long illness, the sum of 250*l.*, and also all his household goods, furniture and linen; the servant is entitled both to her wages and legacy. *582*

SETTLEMENT.

See MARRIAGE SETTLEMENT.

SPECIFIC PERFORMANCE.

1. Though a vendor of an estate does not produce his deeds, or tender a conveyance within the time limited by the articles, the Court does not regard this neglect, but will decree a sale notwithstanding. *231*
But see the note subjoined.
2. A court of equity does not compel a purchaser specifically to perform his contract for the purchase of an estate where the goodness of the title depends upon difficult and doubtful points of law. *461*
3. The ancestors of of the plaintiff, *Si John Banks*, being seised of the

manor of *Canford Priors*, and the ancestors of the defendants, Sir *John Webb*, being seised of the manor of *Great Canford*, in 1639, entered into an agreement, whereby after reciting that there were wastes lying intermixed, which belong to both manors, and that one fourth part belonged to *Canford Priors*, and that *J. Webb* and his ancestors had made enclosures thereof, it was agreed that Sir *J. Banks* might inclose fifty acres of the heath, and that *J. Webb* might enjoy the lands formerly inclosed, and that the residue should be divided into four equal parts; one fourth to be enjoyed by Sir *J. Banks*, and the remaining three fourths by *J. Webb*; and the same division should be made in the event of an inclosure; upon a bill brought by the plaintiff for a specific performance of the agreement, or in case the Court should not think fit to execute the agreement, that the limits and boundaries of the waste belonging to each manor might be ascertained; upon the ground that the agreement was made by a tenant for life, who could not bind the remainder-man; that it had not been carried into execution within a hundred years; that the acts of ownership on the part of the defendant's ancestors, inconsistent with the agreement, far outweighed the acts of ownership on the other side, a specific performance of the agreement refused; and the plaintiff not having shewn a title to or possession of the soil, or any impediment why he could not establish his title at law; the Court would not direct a commission or an issue to ascertain the boundaries of the waste; and a cross bill by the defendant, that he might be quieted in possession of the waste, dismissed, being founded upon a mere legal title, and no trials at law having been had to try the right. Page 653

4. *Richard Lloyd* devised some cottages and a mill to his six children; the mother as guardian of the children and the eldest son demised the premises for forty-one years; they

all attained twenty-one, and accepted the rent for ten years after the youngest came of age, and then brought an ejectment against the persons claiming under the lessee; under the circumstances of the lease being beneficial to the family, and of the long acquiescence of the parties; The Court decreed the lease to be established during the residue of the term. Page 669

5. Equity will decree performance of parol agreements if it is admitted in the answer or if material and unequivocal acts have been done in part performance. 681

See WILL.

SUPPLEMENT.

It is a constant rule that matters subsequent to the original bill must come by way of supplemental bill. 21

T.

TACKING.

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TENANT IN TAIL.

A tenant in tail out of possession cannot bring a bill to perpetuate testimony. 512

TENANT FOR LIFE.

See ESTATE FOR LIFE.

TRUST.—TRUSTEES.

Where stock standing in the name of a trustee was by marriage articles, (to which the trustee was a party) settled as money at the value which the stock then bore, and was therein stated to have been paid to the trustee who gave a receipt for the money indorsed upon the marriage articles, but which stock had never in fact been sold out: held that the trustee was not liable for

a loss which was incurred by the stock not having been then sold out ; the stock in the mean time having fallen in value.

Page 31

See POWER, 5.

TRUSTEES FOR PRESERVING CONTINGENT REMAINDERS.

1. Where by a marriage-settlement the husband conveys his estate to trustees to the use of himself for ninety-nine years, if he should so long live, with remainder to trustees to preserve contingent remainders, remainder to the wife for life, remainder to the heirs of her body by the husband, with a covenant on the part of the husband not to bar or destroy the estates intended to be settled, this Court will not compel the trustees to destroy the contingent remainders by joining in a sale. 94
2. Where a testator, after giving certain legacies to his daughter, and after charging his real and personal estate with the payment of certain legacies, annuities, and 20*l. per annum*, for ten years, for putting out apprentices, as his trustees should appoint, devises and bequeaths all the rest and residue of his real and personal estate to trustees, their heirs, executors, and assigns, upon trust, to pay certain annual sums to his son *Isaac* for life ; the rest and residue of the yearly rents and profits, during his life, to be applied for the maintenance and education of his children, except 100*l. per annum* to his wife, after his son's decease, gives one moiety of the trust estate to such child or children of his son *Isaac* as he should leave, their respective heirs, executors, and assigns, and the other moiety thereof to the child or children of his grandson *Joseph*, and the child or children of his daughter, their heirs, executors, and assigns. *Isaac* having died before the birth of the plaintiff, who is the only child of *Joseph* ; held, that by the devise of the real estate, the legal estate of inheritance vested in the trustees, and that the devise to the plaintiff was a

contingent remainder of a trust estate, and that the legal estate in the trustees supported the contingent remainder.

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3. *J. H.*, by his will, devises his real estate to trustees and their heirs, upon trust for *Samuel Hopkins*, only son of *John Hopkins*, for life, and after his decease, in trust for the first and other sons of his body successively in tail male, and in default of such issue, in case *John Hopkins* should have any other son or sons of his body, then in trust for all and every such other son and sons respectively and successively, for life, with like remainders to their several sons, as are limited to the issue male of *Samuel Hopkins*, and for default of such issue, then in trust for the first and every other son of *Sarah*, the eldest daughter of *John Hopkins*, successively for life, with remainder to the heirs male of their respective bodies, with similar limitations to the sons of three other daughters of *John Hopkins*, or to the sons of any other daughters which he might afterwards have born, and for default of such issue, in trust for the first and every other son of *Hannah Dare*, successively and respectively for life, with like remainders to the heirs male of every such son, and after other remainders in trust for his own right heirs ; and the testator declared that none of the persons to whom his estates were limited for life, should be in the actual possession thereof, and in the enjoyment of the rents and profits of any other part thereof, than is provided by his will, until they should have respectively attained their ages of twenty-one years, and in the mean time his trustees and their heirs and executors, were to make allowances for their maintenance and education, and the overplus of the rents and profits above such allowances, and after payment of his debts and legacies, should go to such person as should be entitled to or come into the actual possession of his real estate ; and the testator gave to *James Hopkins*, one of the trustees, an an-

nuity of 300*l.* until some person under his will should come into the actual possession of his real estate by attaining his age of twenty-one years, and the rest and residue of his personal estate, after payment of his debts and legacies, he gave to his executors in trust, to be laid out in the purchase of lands, to be conveyed to his executors upon the same trusts as he had declared concerning his real estate; *Samuel Hopkins* having died in the lifetime of the testator, and *John Hopkins* since the death of the testator having had *William*, another son born, who had died, and there being no issue male of *John Hopkins*, or any of his daughters, the plaintiff *John Hopkins*, late *Dare*, brought his bill claiming to be entitled to the estates devised, and to be purchased with the surplus of the personality as tenant in tail male; held that there was a sufficient estate in the trustees to support the contingent remainders to the male issue of *John Hopkins*, and of his daughters living at the testator's death, and that the plaintiff was not entitled to the relief sought by his bill. Page 606

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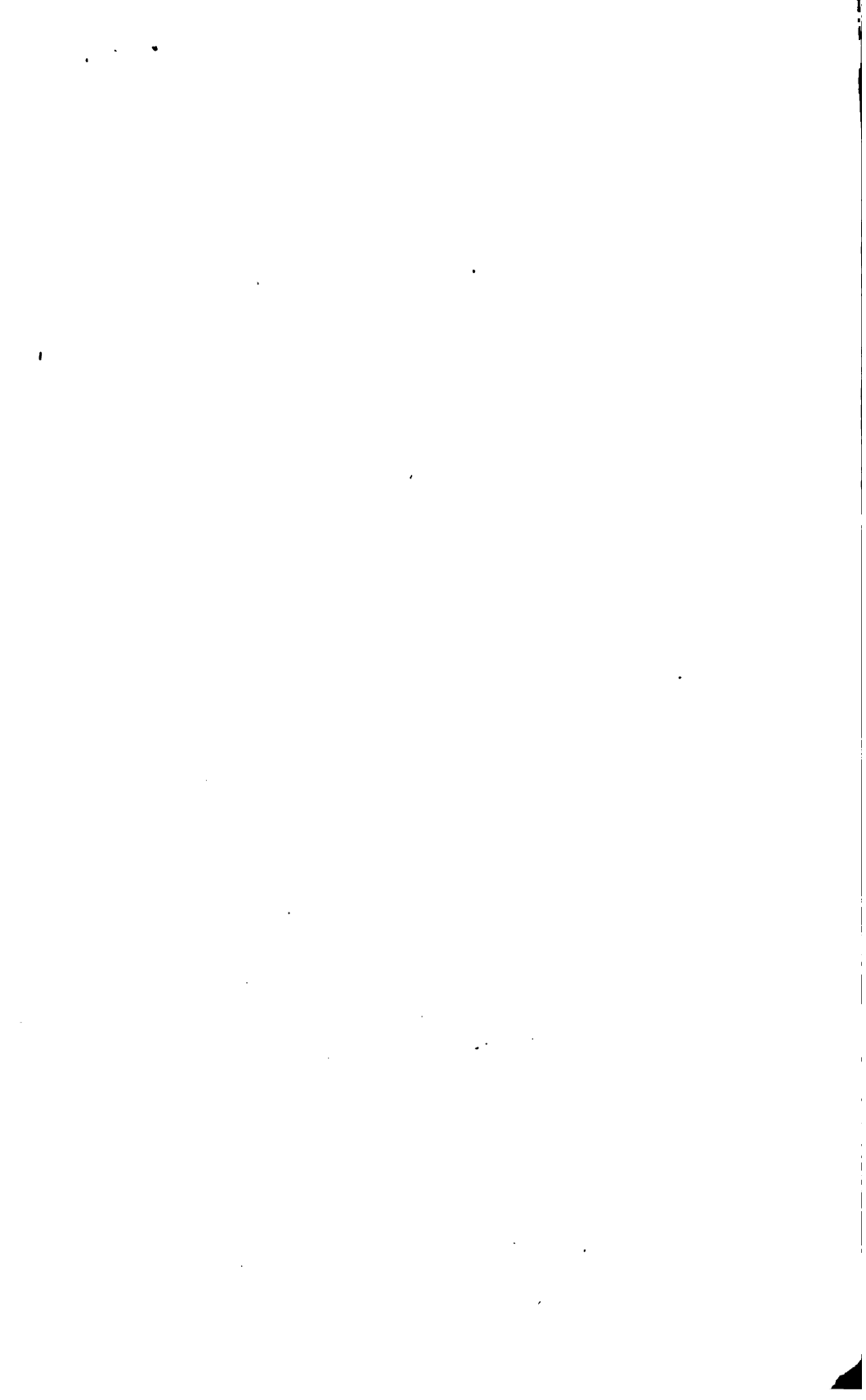
WILL.

Sir *L. Anderton* having entered into a contract for the sale of part of his real estates, by will devises his real and personal estate to trustees to raise money by sale or mortgage, to pay and perform his debts and contracts; and by a codicil, directs his trustees, after payment of his debts and legacies, to settle the whole estate upon the children of his brother *Francis Anderton*, and their issue, and by a second codicil, he gives his personal estate to *Thomas Fortescue*, and directs that his debts, legacies, and funeral expences, shall be paid out of the money to be raised by the mortgage and sale of his real estate; *Francis Anderton*, who was his heir, had been attainted of high treason, and was unmarried; held, that the Crown, subject to the payment of the interest of the debts, was entitled to the rents and profits of the devised estate, until a son of *Francis Anderton* shall come in esse; and that the personal estate bequeathed to *Thomas Fortescue* was exempt from the payment of debts and legacies; and that *Thomas Fortescue* had a right to in-

sist upon the execution of the contract, though the purchaser and trustees had agreed to abandon it, subject however to the contract being set aside, if it should turn out that a considerable part of the estate were leasehold, or creditors being concerned, if it should turn out upon inquiry that the consideration was very inadequate. *Page 187*

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1. The writ *de nomine replegiando* is an original writ, and the party may sue it of right. *Page 24*
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